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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 699

FAR EAST CONFERENCE, NORTH ATLANTIC BALTIC FREIGHT CONFERENCE, NORTH ATLANTIC MEDITERRANEAN FREIGHT CONFERENCE, NORTH ATLANTIC UNITED KINGDOM FREIGHT CONFERENCE, NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, AND NORTH ATLANTIC FRENCH ATLANTIC FREIGHT CONFERENCE,

Petitioners,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

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Petitioners,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, dated August 20, 1964, and the judgment entered thereon, affirming orders of the Federal Maritime Commission dated December 19, 1963.

Citations to Opinions Below

The Court of Appeals' opinion and decision, not yet reported, are printed, *infra*, Appendix A.

Jurisdiction

The decision of the Court of Appeals was handed down and judgment thereon entered on August 20, 1964. The jurisdiction of this Court is invoked under § 10 of the Judicial Review Act (Federal Agencies), 64 Stat. 1132 (5 U.S.C. § 1040) and 28 U.S.C. § 1254.

Questions Presented

1. Do the Federal Maritime Commission's demands for information in the orders under review relate to subjects over which it has jurisdiction?

2. Are the Commission's orders authorized by § 21 of the Shipping Act, 1916, as amended, and § 6 of the Administrative Procedure Act?

3. Do the Commission's orders contain a statement of purpose sufficient to permit a determination of the relevancy and reasonableness of the information sought, and, therefore, to satisfy the requirements of Amendment IV to the Constitution of the United States?

Statutes Involved

The constitutional and statutory provisions involved are: Amendment IV to the Constitution of the United States; §15 of the Shipping Act 1916, 39 Stat. 733, as amended by 75 Stat. 763 (46 U.S.C. §814); §17, Shipping Act, 1916, 39 Stat. 734 (46 U.S.C. §816); §18(b)(5), Shipping Act, 1916, as amended, 75 Stat. 765 [46 U.S.C. §817(b)(5)]; §21, Shipping Act, 1916, 39 Stat. 736 (46 U.S.C. §820); §212(e), Merchant Marine Act, 1936, 49 Stat. 1990 [46 U.S.C. §1122(f)]; §§2, 4 and 10 of the Judicial Review Act (Federal Agencies), 64 Stat. 1129, as amended, 1130 and 1132 (5 U.S.C. §§1032, 1034 and 1040); and §5 of the Administrative Procedure Act, 60 Stat. 240 (5 U.S.C. §1005). Because these provisions are lengthy, they are set forth in Appendix B.

Statement

Petitioners (hereinafter, the "Conferences") are rate-making associations of common carriers by water in the foreign commerce of the United States, operating under agreements approved by the Federal Maritime Commission or its predecessor agencies pursuant to § 15 of the Shipping Act, 1916, as amended, 75 Stat. 763 (46 U.S.C. § 814).

Pursuant to these agreements the Conferences establish tariffs of ocean freight rates, which are filed with the Commission in accordance with § 18(b)(1) of the Shipping Act. The member carriers undertake to assess and apply these rates on cargoes carried by

them in the export trades from the United States covered by the respective conference agreements.

On December 19, 1963, the Federal Maritime Commission issued orders, purportedly under § 21 of the Shipping Act, 1916, which were served upon the Conferences on December 24, 26 and 27, 1963. (R. 24, 75, 135.)[1] Part I of these orders demanded that the Conferences, as separate entities apart from their common carrier members, provide detailed information as to rate-making activities. These orders did not arise out of any proceeding instituted by way of complaint or on the Commission's own motion, as provided in § 22 of the Shipping Act, 1916, 39 Stat. 736 (46 U.S.C. § 821), but bore the otherwise unidentified and unidentifiable label of "Foreign Trade Study" with a specific number. They were likewise totally unrelated to any proposal for drafting new legislation.

The Commission's orders roughly paraphrased several sections of the Shipping Act, 1916, 39 Stat. 728, as amended (46 U.S.C. §§ 801 *et seq.*) and one section of the Merchant Marine Act, 1936, 49 Stat. 1990 [46 U.S.C. § 1122(f)]. Then, in the only portion which might be claimed to constitute a statement of purpose, they provided:

> "In order that the Commission may be properly informed as to matters bearing upon its responsibilities under these statutory provisions, and to determine what action if any it should take pursuant to such statutory provisions, it is necessary

[1] References marked "R." are to pages of the Joint Appendix constituting the record in the court below, copies of which are being filed in this Court.

> that the conference and the carriers named herein furnish the Commission with the information hereinafter specified."

The Conferences were both puzzled and disturbed. The failure to state any comprehensible purpose would itself have made the orders vulnerable under previous decisions. The only possible clue to the Commission's purpose was an accompanying communication from the Commission's Chairman. (R. 12, 73, 130.) This letter, after referring to "disparities" between the Conferences' outbound rates and the inbound rates of other conferences concerned with reciprocal trades, requested the Conferences to take immediate steps to adjust outward rates to inward rates. Failing such adjustment, the Conferences were called upon to furnish a full justification of so-called "disparities". The letter concluded:

> "For the purpose of evaluating your statement and determining whether formal proceedings should be instituted, the Commission is also requiring that you furnish the information described in the accompanying order issued pursuant to section 21 of the Shipping Act, 1916."

If this be considered a statement of purpose, *dehors* the order, the purpose was to impeach or corroborate a purely voluntary explanation of rates not yet in existence.

The Conferences and others affected filed motions for reconsideration and vacation of the so-called Section 21 orders. (R. 30, 99, 149.) In these motions they pointed out that the orders contained no statement of purpose, no valid objective and nothing to which the

documents could properly be related. They also pointed out that if, contrary to the letter of the Commission's Chairman, the purpose was to determine whether the Conferences' rates were too high or too low under Section 18(b)(5) of the Shipping Act, 1916, as amended, 75 Stat. 764 [46 U.S.C. §817(b)(5)], the demands were unauthorized and irrelevant, for they related to the rate-making process rather than to the effect of the rates—the only question open under the amendment to the statute.

All of these motions were denied by the Commission's order dated February 7, and served February 26, 1964. (R. 33, 111, 160.)

Because the consequences of compliance with the Commission's orders were of far-reaching importance, the Conferences filed review petitions in the Court of Appeals for the District of Columbia Circuit under §§2 and 4 of the Judicial Review Act (Federal Agencies), 64 Stat. 1129, 1130 (5 U.S.C. §1032 and 1034). (R. 40, 118, 167.) The Court of Appeals denied petitioners' applications for stay and interlocutory injunction under date of March 12, 1964, with Judge Burger dissenting.[2] The cases were argued and, on August 20, 1960, the Court rendered an opinion (Appendix A) in favor of the Federal Maritime Commission, Judge Miller dissenting.

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[2] This order was made in Cases Nos. 18,468 and 18,471 in the court below. (R. 251, 252.) In Cases Nos. 18,475 and 18,477, below, applications for interlocutory injunctions were denied on March 20, 1964. (R. 253, 254.)

Reasons for Granting the Writ

I. The Questions Presented Are Important for the Administration of the Shipping Act and of Regulatory Statutes Generally

Viewed either as an interpretation of the information-gathering powers of the Federal Maritime Commission under Section 21 of the Shipping Act or as an interpretation of the Commission's substantive jurisdiction, the decision below affects the rights of more than 400 common carriers by water serving United States foreign commerce.[3] Most of those carriers are members of one or more of the 120 steamship conferences establishing freight rates in the numerous and diverse trade routes on which that commerce flows. Their vessels fly the flags of all the principal maritime countries of the world and of many of the emerging nations seeking to establish themselves in the maritime field. The increasing extent to which the United States regulatory activity unilaterally burdens ocean-borne commerce among nations is a matter of grave concern to those carriers, to the countries where their vessels are registered, and to the nations whose foreign commerce is also the foreign commerce of the United States.

However, even broader considerations are involved. The ever-increasing scope of intervention by federal

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[3] The Section 21 orders involved in the *Montship* and *Kerr* cases were addressed to more than 400 carriers believed by the Commission's predecessor to be subject to the Shipping Act. [*Montship Lines Limited* v. *Federal Maritime Board*, 111 App. D.C. 160, 295 F.2d 147 (1961); *Kerr S.S. Co.* v. *United States*, 284 F.2d 61 (2nd Cir. 1960), certiorari granted and remanded with directions to dismiss as moot, 369 U.S. 422 (1962)].

agencies into the day-to-day activities of regulated industries is a matter of critical importance to all persons entitled to the protection afforded by the Constitution and the Administrative Procedure Act. As a consequence, there is an urgent need for further definition of the judicially enforceable limits upon the inquisitorial powers of administrative agencies.

II. The Federal Maritime Commission's Demands for Information Relate to Subjects Over Which the Commission Has No Jurisdiction

The decision below extends the authority of the Federal Maritime Commission over the level of international ocean freight rates far beyond that granted by Congress. The present case is an important one, in that it represents the first instance in which this issue has been clearly brought before this Court.

It is submitted that the Court of Appeals misinterpreted the provisions of the Shipping Act, and more particularly those of §18(b)(5), 75 Stat. 765 [46 U.S.C. §817(b)(5)], in holding that "the Commission's concern is not solely with the detrimental effect of rates on the commerce of the United States but also with the reasonableness of rates, to which the information sought is related" (Appendix A, p. 9a).

The Commission's predecessors had noted time and again that the Commission and its predecessors had no authority over the level of international freight rates.[4] Indeed, no efforts were made to control the

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[4] *Boston Wool Trade Association* v. *General S.S. Corp.* (Docket 12) 1 USSB 49, 51 (1923); *Rawleigh* v. *Stoomvaart et al.* (Docket 80) 1 USSB 285, 288 (1933); *Contract Rates—Japan/Atlantic & Gulf Freight Conference* (Docket 730) 4 F.M.B. 706, 734 (1955).

level of such rates in the forty-five years between the enactment of the Shipping Act, 1916, and the passage of Public Law 87-346, amending it.

At the time of the 1961 amendments, several suggestions were put forward for granting to the Commission more specific power to control international ocean freight rates. Such efforts were generally opposed, not merely by those dealing with the bill in Congress, but also by the Department of Commerce and the Federal Maritime Board, the Commission's predecessor. In a letter to the Honorable Herbert C. Bonner, Chairman of the House Committee on Merchant Marine and Fisheries, the Secretary of Commerce wrote as follows [H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961) 20-1; Sen. Doc. No. 100, 87th Cong., 2nd Sess., pp. 131-2, hereinafter referred to as "Index to Legislative History"]:

> "* * * In a single conference it is not unusual to have 20 member lines operating vessels of 10 or 15 different flags, all having different costs of operation, precise information as to which is not in the possession of the Board. For the Board to attempt to fix a single rate or maximum and minimum rates which would be reasonable for all the conference members would, we believe, be impossible."

Similar views were expressed by Senator Engle in debates on the floor of the Senate, when he said:

> "It must be remembered that the United States has no power to export the regulatory procedures of our Government. For instance, we cannot apply a rate structure procedure to foreign lines;

> they simply would not submit to it. I read earlier a list of 12 nations which have made it very plain that they will not put up with the United States establishing a rate procedure such as we have for the railroads, which are all domestic, or for bus lines or for any of the other several types of domestic carriers." (Index to Legislative History, p. 267)

All efforts to introduce control by the Commission over the level of international freight rates were thwarted by Congress in the recent amendments to the Shipping Act, 1916.

The only additional power conferred upon the Commission in 1961 was contained in §18(b)(5) of the Shipping Act. This Section provides for Commission disapproval of rates found, *after hearing,* "to be so unreasonably high or low as to be detrimental to the commerce of the United States". The test under this Section is an empirical one—whether particular rates are in fact "detrimental to the commerce of the United States". Yet nothing in any of the information which the Commission is presently demanding of these Conferences could possibly relate to that issue. The demands, although superficially few, would require an unprecedented searching revelation of the full rate-making practices and procedures of the Conferences, together with an accounting of the results thereof.

The reluctance of the Commission's predecessors as well as Congress to embark upon any rate-making procedures in the delicate area of international ocean transportation can easily be understood. This area is one not readily susceptible to unilateral control by any one nation, while conflicting controls by different

countries would put the ocean carriers and the commerce which they serve in an untenable position. It was clearly for this reason that the governments of friendly maritime nations were so deeply concerned with this legislative proposal. The presence of such highly charged international circumstances was recently noted by this Court in *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10, 21-22 (1963).

The Court of Appeals' tangential reference to §212(e) of the Merchant Marine Act, 1936, 49 Stat. 1990 [46 U.S.C. §1122(f)] is, under the circumstances of this case, entitled to no special attention and rests upon no solid foundation. If the Commission's purposes had been truly related to the making of legislative recommendations, the Commission could easily have so indicated. In such a situation the search for information should have been made applicable to all conferences rather than the few who were privileged to receive the Commission's special favors.

The court below found that the information sought related to the "reasonableness of rates." However, since the determination of the reasonableness of rates, except insofar as "detrimental to commerce", is beyond the Commission's authority, the lower court's decision is based upon a wrong, and seriously wrong, premise.

If the Shipping Act, 1916, as recently amended by §18(b)(5), is correctly construed, the only issue properly open to the Commission's consideration is the effect of rates on the commerce of the United States. This Court emphasized the question of effects rather than of methods in connection with rates in *Federal*

Power Comm'n. v. *Hope Gas Co.*, 320 U.S. 591, 602 (1944). See also *Danville Chamber of Commerce* v. *B. & O. R.R. Co.*, 255 I.C.C. 108, 115.

III. The Commission's Orders Are Unauthorized by §21 of the Shipping Act and Fail to Comply with §6 of the Administrative Procedure Act

The Court of Appeals accepted the respondents' argument that since §21 of the Shipping Act provides a procedure for obtaining documents, the obtaining of such documents is "authorized by law", so that no objections may be made under the Administrative Procedure Act or otherwise. However, the legislative history of the Administrative Procedure Act does not warrant any such pat construction. Rather it shows that §6(b) of that Act, 60 Stat. 240 (5 U.S.C. §1005), directing that no reports be required "for any purpose except as authorized by law", has substantive connotations rather than merely procedural ones.

The Senate Judiciary Committee Print of June, 1945, of the antecedent bill, contained the following "explanation" of the provisions of §6(b) (Sen. Doc. No. 248,[3] p. 27):

> "Many statutes conferring administrative powers contain authorization to conduct investigations, but the same statutes rarely include language indicating that such investigations must

[3] Legislative history materials relating to the Administrative Procedure Act were conveniently compiled in Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946), and our citations in the following discussion are to that document except where additional citations to legislativ materials appear desirable. We refer to the document as Sen. Doc. No. 248.

be confined to the jurisdiction and purposes of the agency to which the authority is delegated. Subsection (b) states the established limitations. Although scattered precedents hold that such investigative powers are necessarily so confined, since otherwise delegations would be unrestrained and therefore unconstitutional, the basic rule should be included in any administrative procedure statute."

So also the Report of House Judiciary Committee on the same bill, H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), noted as follows:

"This section is designed to preclude 'fishing expeditions' and investigations beyond jurisdiction or authority. It applies to any demand, whether or not a formal subpena is actually issued. It includes demands or requests to inspect or for the submission of reports. An investigation must be substantially and demonstrably necessary to agency operations, conducted through authorized and official representatives, and confined to the legal and factual sphere of the agency as provided by law. Investigations may not disturb or disrupt personal privacy, or unreasonably interfere with private occupation or enterprise. They should be conducted so as to interfere in the least degree compatible with adequate law enforcement."

Finally, during the debates on S.7 on May 24, 1946 (Sen. Doc. No. 248, p. 346), Representative Sabath commented:

"I should like to bespeak special commendation for the discussion of section 6(B), dealing with

> administrative investigation, found on page 23 of the report of the House Committee on the Judiciary. Investigations, the committee says, must not be 'fishing expeditions', and may not disturb or disrupt personal privacy, or unreasonably interfere with private occupation or enterprise. They should be so conducted as to interfere in the least degree compatible with adequate law enforcement."

All this is in support of the protection afforded by the Fourth Amendment to the Constitution of the United States (see *Federal Trade Commission* v. *American Tobacco Company,* 264 U.S. 298, 305-6 (1924)). The Court of Appeals' error in putting a purely procedural construction on Section 6(b) is a fundamental, far-reaching and important one, needing correction by this Court.

IV. The Commission's Orders Contain No Statement of Purpose Sufficient to Permit a Determination of the Relevancy and Reasonableness of the Information Sought

The Court of Appeals' decision amounts to an abandonment of its holdings in *Montship Lines, Ltd.* v. *Federal Maritime Board,* 111 App. D.C. 160, 295 F.2d 147 (1961) and *Hellenic Lines, Ltd.* v. *Federal Maritime Board,* 111 App. D.C. 151, 295 F.2d 138 (1961) requiring a proper statement of purpose. No inherent differences exist as between the present orders and those held to be inadequate in the *Hellenic Lines* case, as a comparison of the two orders shows:

The Present Orders	*Hellenic Lines Order*
"In order that the Commission may be properly informed as to matters bearing upon its responsibilities under these statutory provisions, and to determine what action if any it should take pursuant to such statutory provisions, it is necessary that the conference and the carriers named herein furnish the commission with the information hereinafter specified."	"That pursuant to the responsibilities vested in the Board by the aforementioned Shipping Act, 1916, and in the effectuation in the public interest of the Board's regulatory duties under that Act, the Board needs the reports, accounts, records, rates, charges and memoranda of facts and transactions hereinafter described * * *".

Although the wording may be slightly different, the substance is the same. The Commission merely says that it thinks it needs the information to carry out its statutory duties. It does not appear whether the purpose is to determine whether the law is being obeyed, or to find out whether suspected violations have occurred, or to decide whether a particular rule of general applicability should be issued, or to determine whether certain legislation should be recommended to Congress.

The salutary effect of the Court of Appeals' decision in *Montship* in protecting the carriers there involved from a purposeless production of papers is demonstrated by the history of the case after its decision. There just is no history. In other words, the Commission abandoned the inquiry rather than state its purpose—and this notwithstanding that the Com-

mission had opposed the issuance of an interlocutory injunction on the ground that the public interest urgently required the production of the data.

The point is a serious one, as the Court of Appeals for the District of Columbia Circuit found in the earlier cases. Vague, indefinite and uncertain orders provide no standards against which the relevancy and materiality of the documents requested can be tested. The Conferences fear that, if the Commission is left free to use § 21 for the purpose of creating an impression of busy regulation whenever the thoroughness of its regulation is called into question, they will be subjected to frequent and harassing production requirements wholly unrelated to the exercise of the Commission's lawful functions. The protection of Amendment IV to the Constitution of the United States is an illusion if the courts may properly accept without question the naked assertions of governmental functionaries that they need information sought by compulsory process.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

New York, N.Y.
November 16, 1964

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,468

FAR EAST CONFERENCE, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,471

NORTH ATLANTIC BALTIC FREIGHT CONFERENCE, ET AL.,
PETITIONERS,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,475

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE,
ET AL., PETITIONERS,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,477

PACIFIC COAST EUROPEAN CONFERENCE, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 18,518

FAR EAST CONFERENCE, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Consolidated Petitions for Review of Orders of the Federal Maritime Commission

Decided August 20, 1964

Mr. Elkan Turk, Jr., with whom *Mr. Seymour H. Kligler* was on the brief, for petitioner in Nos. 18,468 and 18,518.

Mr. Burton H. White, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom *Mr. Arthur E. Tarantino* was on the brief, for petitioners in Nos. 18,471 and 18,475.

Mr. Charles F. Warren for petitioner in No. 18,477.

Mr. Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission, with whom Assistant

Attorney General *William H. Orrick, Jr., Messrs. James L. Pimper,* General Counsel, Federal Maritime Commission, and *Irwin A. Seibel,* Attorney, Department of Justice, were on the brief, for respondents.

Before WILBUR K. MILLER, FAHY and WRIGHT, *Circuit Judges.*

FAHY, *Circuit Judge*: Nos. 18,468, 18,471, 18,475 and 18,477 may be considered together. Each case is a petition by one or more steamship Conferences, composed of common carriers by water and organized under agreements approved by the Federal Maritime Commission under Section 15 of the Shipping Act of 1916, as amended, 75 Stat. 763, 46 U.S.C. § 814 (Supp. IV, 1961), to review orders of the Commission issued under the authority the Commission claims by reason of Section 21 of the Act.[1] The orders are not related to any proceeding pending before the Commission on a complaint, but have been issued as part of a

[1] Appeals from similar orders directed to other Conferences and involving different trade routes and commodities were previously filed in the Ninth Circuit. For that reason the Commission contends that this court is required to transfer these proceedings to the Ninth Circuit under 28 U.S.C. § 2112(a). That section provides that when proceedings are instituted in two or more courts of appeals with respect to the same agency order the agency shall file the record in that court in which such proceedings were first instituted and the other courts shall thereupon transfer the proceedings concerning such order to the court in which the record has been filed. We do not think that this section is here applicable; for although the requests for production in the orders involved in these cases and the orders appealed from in the Ninth Circuit are substantially identical, the orders themselves cannot be considered the "same order" within the meaning of the statute. Moreover, assuming that aside from the statute it is within the inherent power of the court to transfer the cases in the interest of sound judicial administration, we do not think that this case is an appropriate one for the exercise of such power since the appeals filed in the Ninth Circuit have already been disposed of by that court.

"Foreign Trade Study" by the Commission. Section 21 authorizes the Commission to

> require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath, whenever the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary,

followed by penalty provisions for non-compliance. 39 Stat. 736 (1916), 46 U.S.C. § 820 (1958).

Only Part I of the orders is involved.[2] It requires each Conference, as agent for its common carrier members, to produce at the Commission's offices in Washington, D. C., as follows:

> a. A copy of any letters, memoranda, circulars, and other correspondence or documents exchanged between the conference and any of its common carrier member lines and/or any of their agents, during the period January 1, 1962 through September 30, 1963, relating to rates on any of the commodities listed in Attachment A hereto. Documents which merely list or state such rates without discussion need not be furnished.
>
> b. A copy of any reports, studies, analyses or

[2] Other parts of the orders as originally issued have been suspended by Commission order of February 26, 1964.

documents compiled by or for or received by the conference between January 1, 1959 and September 30, 1963, with respect to all rates charged by the conference. Documents which merely list or state such rates without discussion need not be furnished.

Whenever any of the foregoing information has been otherwise furnished to the Commission, at the request of the Commission, a statement to that effect identifying the matter filed and the time of such filing, may be submitted in lieu of the matter requested.

This request was preceded by a recitation of the requirements of certain provisions of the Shipping Act[3] and a statement that production of the requested data was necessary "in order that the Commission may be properly informed as to matters bearing upon its responsibilities under these statutory provisions, and to determine what action if any it should take pursuant to such statutory provisions. . . ."

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[3] This part of the order reads as follows:

Under various provisions of the Shipping Act, 1916, and the Merchant Marine Act, 1936, the Commission is charged with certain regulatory responsibilities with respect to rates and practices of common carriers in the waterborne foreign commerce of the United States.

Section 15 of the Shipping Act, 1916, requires, among other things, that the Commission disapprove, cancel, or modify agreements found to be unjustly discriminatory or unfair as between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States or to be contrary to the public interest. Section 17 of the Shipping Act, 1916, prohibits common carriers by water in the foreign commerce of the United States from charging rates or fares which are unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign

Accompanying each order was a letter from the Chairman of the Commission stating that certain rates and charges applicable to cargo from certain ports of the United States to certain foreign ports exceeded those applicable to cargo from the foreign ports to ports of the United States, particularly with respect to the commodities listed in Attachment A to the orders; and that the Commission was considering institution of an investigation of the matter pursuant to Section 212(e) of the Merchant Marine Act, 1936, and/or rate proceedings to determine the issue of the detrimental character of the rates within the meaning of Section 18(a)(5) [sic—probably should read "18 (b)(5)"] of the Shipping Act, 1916, as amended. The letter continued,

> Prior to the institution of proceedings pursuant to the aforementioned statutory provisions, and if possible to obviate the necessity therefor, we request that you take immediate steps to make appropriate adjustments in your tariffs, particularly with respect to the rates on the commodities enumerated in Attachment A, or that you submit to the Commission statements setting forth all facts and conditions which explain or justify the higher export rates published by your conference. We

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competitors. Section 18(b)(5) of the Shipping Act, 1916, requires that the Commission disapprove rates found to be so unreasonably high or low as to be detrimental to the commerce of the United States.

Under Section 212(e) of the Merchant Marine Act, 1936, the Commission is required to investigate rates whereby shippers from the United States pay a higher rate from a United States port to a foreign port than the rate charged by the same carrier on similar cargo from such foreign port to such United States port, and to recommend to Congress measures by which such discimination may be corrected.

> request your compliance with the foregoing on or before December 15, 1963. For the purpose of evaluating your statement and determining whether formal proceedings should be instituted, the Commission is also requiring that you furnish the information described in the accompanying order issued pursuant to Section 21 of the Shipping Act, 1916.[4]

The question is whether the orders are valid. We note first the contention, pressed in No. 18,477, that the letter accompanying the order demonstrates that the Commission's purpose was to force a reduction in rates by requiring the Conferences to "reduce or produce", and that such a coercive tactic constitutes an invalid exercise of administrative authority. We can find no such coersive purpose in the combination of the order and the letter since, as we view the matter, the information requested was to be supplied whether or not the letter itself led to the rate adjustments suggested. We have the question whether the orders are valid, not the letters. We cannot hold the orders invalid if, considered apart from the letters, they are within the Commission's authority. *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, 145 (1937).

As to this we bear in mind the broad regulatory responsibilities of the Commission, considered with the exemption enjoyed by the Conferences from the

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[4] By orders of March 12, 1964, March 20, 1964, and April 22, 1964, this court denied the applications of petitioners for interlocutory injunctions restraining enforcement of the Commission's orders pending final determination of the petitions to review. The orders of March 12 also dissolved orders previously entered by this court staying the effectiveness of the Commission's orders in Nos. 18,468 and 18,471.

antitrust laws by reason of Commission approval of Conference agreements. See *Isbrandtsen Co.* v. *United States,* 93 U.S. App. D.C. 293, 297, 211 F.2d 51, 55, *cert. denied, Federal Maritime Board* v. *United States,* 347 U.S. 990 (1954). Within these broad responsibilities is lodged the specific authority here sought to be exercised. As to this we cannot accept petitioners' suggestion that Section 21 orders must be limited to complaint proceedings. They are available to aid investigation without the need for the support of a charge of violation of the Act, or belief even that such a violation is probable. *Isbrandtsen-Moller Co.* v. *United States, supra* at 144. In this respect the discussion by the Supreme Court in *United States* v. *Morton Salt Co.,* 338 U.S. 632, 652 (1950), is applicable, though that case involved the investigatory powers of the Federal Trade Commission and not of the Maritime Commission. And see *Pacific Westbound Conf.* v. *United States,* — F.2d — (9th Cir. 1964). *Cf. Montship Lines, Ltd.* v. *Federal Maritime Board,* 111 U.S. App. D.C. 160, 166, 295 F.2d 147, 153 (1961).

We need not discuss whether or not the data demanded, if the demand is otherwise valid, is of the type obtainable under Section 21, namely, "any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act"; for petitioners accept the view of the Commission in this respect. At least they do not dispute it in these cases, no doubt in part because of the views expressed by this court in *Montship, supra,* as to the broad construction to be

given the enumeration in Section 21 of the kind of data the Commission may require.[5]

There is a contention, however, that a Conference is not an entity to which a Section 21 order may be applied. That section is applicable to "any common carrier by water" or "other person subject to this Act," or "any officer, receiver, trustee, lessee, agent or employee" thereof. The fact is that the Conferences are in many respects agents of the carriers which compose them. If the Conferences are in possession of the data, and the data is otherwise validly sought, it may not be refused on the theory the Conferences are not answerable to a Section 21 order.

Petitioners also contend that the orders are invalid because the data sought is not reasonably related to the Commission's statutory authority over rates in foreign commerce. They claim that the Commission's only source of control over such rates is Section 18(b)(5) which requires Commission disapproval of rates found "to be so unreasonably high or low as to be detrimental to the commerce of the United States," and under this limited statutory authority the Commission is concerned only with the effect of rates, not with the rate-making processes to which the requested data relates. As we read the statute, however, the Commission's concern is not solely with the detrimental effect of rates on the commerce of the United States but also with the reasonableness of rates, to which the information sought is related. We have in mind also the command of Section 212(e) which di-

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[5] Petitioners, however, do contend that an order "to produce" is not authorized by Section 21 since that section literally requires a carrier only "to file" the requested data. Whatever the difference between producing and filing, we think this contention was disposed of by this court's opinion in *Montship, supra*.

rects the Commission to investigate disparities between import and export rates and to recommend to Congress measures by which such discrimination may be corrected.

A principal argument of petitioners is based on the decisions of this court in the *Montship* case, and in *Hellenic Lines, Ltd.* v. *Federal Maritime Board,* 111 U.S. App.D.C. 151, 295 F.2d 138 (1961), which held the Section 21 orders then before the court to be invalid because they were set forth in such general terms that no standard existed by which to determine the relevancy of the information demanded, a defect which bore upon the reasonableness of the orders. Here, however, the purposes are set forth with reference to particular sections of the statute and the need of the Commission for the information in order "that the Commission may be properly informed as to the matters bearing upon" the responsibilities imposed upon it by the sections thus referred to. This is clearly an effort by the Commission to meet the defect pointed out in our *Montship* and *Hellenic Lines* decisions, and, like the Ninth Circuit in its recent decision in *Pacific Westbound,* we think the effort has succeeded and that the stated purposes of the order show the relevancy of the data sought. The requirements to be met in the investigatory area of administrative agencies, stated in general terms in the *Morton Salt* case, seem to us to be satisfied in this case:

> [I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 338 U.S. 632, 652.

A word now as to the possible oppressiveness of the demand to produce, that is, the difficulty of compliance

in relation to the need of the Commission to obtain the information. We have no basis in the record for finding oppressiveness. We rely upon the prudence and reasonableness of the Commission in cooperating with the Conferences in the manner of complying. *Cf. United States* v. *Morton Salt Co., supra* at 653.

No. 18,518. Aside from matters above disposed of, in this case Far East Conference challenges a Section 21 order demanding the data which is described in the copy of the order which is set forth as an Appendix to this opinion. As appears therefrom the data demanded relates to requests and complaints of shippers. Section 15 of the Shipping Act of 1916 was amended in 1961, 75 Stat. 764, 46 U.S.C. § 814 (Supp. IV, 1961), by adding a provision as follows:

> The Commission shall disapprove any such [Section 15] agreement, after notice and hearing, on a finding of . . . failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

The order recites that the Commission needs the data sought so as to be adequately informed as to matters bearing upon its responsibilities under this statutory provision. The objection of petitioner is that the statute vests authority in the Commission with respect to reasonable procedures for hearing and considering shippers' requests and complaints, whereas the order seeks data not as to procedures but as to requests and complaints made, and action taken in connection therewith. But it seems quite clear to us that the Commission in ascertaining whether or not the Conference has adopted and is maintaining reasonable procedures respecting requests and complaints of

shippers is entitled to find out what requests and complaints have been made and what disposition has been made of them. The information requested is designed to inform the Commission as to this.

In all the cases we have not neglected to consider Section 6(b) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. § 1005(b) (1958), limiting an agency in demanding reports and making investigations except as the agency may be authorized by law. Being of opinion that the orders are authorized by law, it follows we find Section 6(b) no bar to them.

Affirmed.

Circuit Judge WILBUR K. MILLER dissents.

APPENDIX

Section 21 Order

STUDY—CONFERENCE PROCEDURES FOR HEARING AND CONSIDERING SHIPPERS' REQUESTS AND COMPLAINTS

Section 15 of the Shipping Act, 1916, requires, among other things that the Commission disapprove any agreement between parties subject to that Act on a finding of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

In order that the Commission may be adequately informed as to matters bearing upon its responsibilities under this statutory provision, and to determine what action, if any, it should take under this provision, it is necessary that the conference named herein furnish the Commission with the information hereinafter specified.

Now THEREFORE, pursuant to the authority vested in it under Section 21 of the Shipping Act, 1916, the Commission hereby orders THE FAR EAST CONFERENCE (Agreement No. 17), as agent for each of the member lines thereof, to produce at the Commission's offices in Washington, D. C., not later than January 22, 1964 the following:

1. A copy, or if oral, a complete statement of each request and/or complaint filed during the period July 1, 1963 to December 31, 1963; inclusive.

2. Copies of all interim correspondence and memoranda including all inter-office memoranda and correspondence between the conference and carriers and any report or studies pertaining to each individual request and/or complaint mentioned in Paragraph 1 above.

3. A copy, or if oral, a complete statement of each notice to shippers advising of actions taken in connection with such requests and complaints.

4. A brief resume to accompany the above setting forth the date received, the name and address of the party, the nature of the request or complaint, the date of disposition, the method of disposition, and if denied, the reason for such denial.

Whenever any of the foregoing information has been otherwise furnished to the Commission, at the request of the Commission, a statement to that effect, identifying the matter filed and the time of such filing, may be submitted in lieu of the matter requested.

By Commission December 27, 1963

Francis C. Hurney
for Thomas Lisi
Secretary

APPENDIX B

Constitutional and Statutory Provisions Involved

I. Amendment IV to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

II. Sec. 15, Shipping Act, 1916, 39 Stat. 733, as amended by 75 Stat. 763 (46 U. S. C. §814):

That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative

working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

III. Sec. 17, Shipping Act, 1916, 39 Stat. 734 (46 U. S. C. §816):

That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

IV Sec. 18(b)(5), Shipping Act, 1916, as amended, 75 Stat. 765 (46 U. S. C. §817(b)(5)):

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unrea-

sonably high or low as to be detrimental to the commerce of the United States.

V. Sec. 21, Shipping Act, 1916, 39 Stat. 736 (46 U. S. C. §820):

That the board may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

VI. Sec. 212(e) Merchant Marine Act, 1936, 49 Stat. 1990 (46 U. S. C. § 1122(f)):

Sec. 212. The Commission is authorized and directed:

* * *

(e) To investigate under the regulatory powers transferred to it by this Act, any and all discriminatory rates, charges, classifications, and practices whereby exporters and shippers of cargo originating in the United States are required by any common carrier by water in the foreign trade of the United States to pay a higher rate from any United States port to a foreign port than the rate charged by such carrier on similar cargo from such foreign port to such United States port, and recommend to Congress measures by which such discrimination may be corrected.

VII. Sec. 2 of the Judicial Review Act (Federal Agencies, 64 Stat. 1129, as amended (5 U. S. C. §1032):

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402(a) of the Communications Act of 1934, as amended, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 309(e) and 317 of the Packers and Stockyards Act and section 7(a) of the Perishable Agricultural Commodities Act, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Admin-

istration entered under authority of the Shipping Act, 1916, as amended, and the Intercostal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended, and (d) of the Atomic Energy Commission made reviewable by section 189 of the Atomic Energy Act of 1954, as amended.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof.

VIII. Sec. 4 of the Judicial Review Act (Federal Agencies), 64 Stat. 1130 (5 U. S. C. §1034):

Any party aggrieved by a final order reviewable under this Act may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General.

IX. Sec. 10 of the Judicial Review Act (Federal Agencies) 64 Stat. 1132, (5 U.S.C. §1040):

An order granting or denying an interlocutory injunction under section 1039(b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254(1) of Title 28: Provided, That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254(1) of Title 28: Provided further, That application therefor be duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254(3) of Title 28, regarding certification, and of section 2101(e) of Title 28, regarding stays, shall also apply to proceedings under this chapter.

X. Sec. 6(b) of the Administrative Procedure Act, 60 Stat. 240 (5 U. S. C. §1005):

(b) INVESTIGATIONS—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

* * *

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 700

PACIFIC COAST EUROPEAN CONFERENCE,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the District of Columbia Circuit

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No.

PACIFIC COAST EUROPEAN CONFERENCE,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the District of Columbia Circuit

---

Petitioner Pacific Coast European Conference respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on August 20, 1964.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals, not yet officially reported, is printed as Appendix A hereto.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on August 20, 1964. The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code, and Section 1040 of Title 5, United States Code.

QUESTIONS PRESENTED

1. May the Federal Maritime Commission order the "production" at its "offices in Washington" of "letters, memoranda, circulars, and other correspondence or documents" under the guise of calling for a "report" authorized by Section 21 of the Shipping Act, 1916, as amended (46 U.S.C. 820)?

2. Is an administrative agency demand sustainable, as a matter either of statutory or Constitutional law, which asserts as the matter under inquiry merely a paraphrase of several, mutually divergent, statutory provisions, and which states as its only purpose or justification an alleged "need" of the agency, "[i]n order that [it] may be properly informed as to matters bearing on its responsibilities"?

3. Is the sweeping obiter dicta of *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), to be read as cover

of authority for any administrative demand, no matter how broad, how burdensome, or how irrelevant, so as effectively to have foreclosed judicial review of such orders; if not, should that sweeping language be re-examined?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are, principally, Section 21 of the Shipping Act, 1916, as amended (46 U.S.C. § 820), and, as bearing on the proper use thereof, Section 27 of the same Act (46 U.S.C. § 826), Section 212(f) of the Merchant Marine Act of 1936 (46 U.S.C. § 1122(f)), Sections 3(a) and 6(b) of the Administrative Procedure Act (5 U.S.C. §§ 1002(a), 1005(b)), and the Fourth Amendment to the United States Constitution. All of these are set forth in Appendix B, *infra*.

Also involved, for comparative purposes, are Sections 6 and 9 of the Federal Trade Commission Act (15 U.S.C. §§ 46, 49); these too are set out in Appendix B.

STATEMENT OF THE CASE

Jurisdiction was vested in the Court of Appeals by virtue of Section 1034 of Title 5, United States Code, authorizing court of appeals review of a final administrative order.

Petitioner Pacific Coast European Conference is an unincorporated association of twenty-one steamship lines

which operate in the foreign commerce of the United States, under an agreement filed with and approved by a predecessor agency of the Federal Maritime Commission in accordance with the provisions of Section 15 of the Shipping Act, 1916, as amended (46 U.S.C. § 814).

On or about November 26, 1964, citing authority of Section 21 of the Shipping Act (46 U.S.C. § 820), the respondent Federal Maritime Commission served upon the administrative chairman of the Conference an order entitled "Foreign Trade Study 63-15" [JA 178-186],[1] together with a covering letter accompanying the order [JA 176-178]. Part I of the order, which as will appear hereafter is the only part relevant to the instant dispute, directed the petitioner, "as agent for" its individual member steamship lines, "to produce at the Commission's offices in Washington, D.C.," a mass of vaguely defined documents [JA 179-180].

Like orders were served upon fifteen other conferences of steamship lines covering the major foreign trade routes of the United States. Of these, seven covered export trades and the remaining eight covered import trades.

On or about December 27, 1963, in response to numerous protests, the Commission served upon petitioner and the other fifteen conferences an "Amended Section 21 Order", entitled similarly to the first and differing from

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[1]The full title of the order was, "Section 21 Order—Study - The Trade from U.S. West Coast Ports to Ports in Scandinavia and Continental Europe—Foreign Trade Study 63-15."

References to the Joint Appendix, prepared for use as the record in the Court of Appeals and filed in this Court concurrently with this petition, will be designated as "JA ....".

it only in minor respects; under the amended order, compliance was ordered by February 20, 1964 [JA 187-192].

On January 24, 1964, petitioner moved the Commission to reconsider and quash the amended order [JA 219-235]. Similar protests were made by the other conferences. On February 5, 1964, the Commission postponed the compliance date for all of the orders until March 2, 1964 [JA 32]. Thereafter, on February 26, 1964, the Commission served its "Denial of Motions to Reconsider and Vacate or Stay" [JA 33-39]. In an accompanying document the Commission "postponed pending further order of the Commission" compliance with Part II of each of the orders directed to conferences covering export trades [JA 40].

On March 9, 1964, petitioner filed in the Court of Appeals for the District of Columbia Circuit its petition for review of the amended Section 21 order [JA 171-176], together with an application for interlocutory injunction pending court review [JA 216-218].[2] Similar petitions and applications were filed in the same Court on behalf of six other conferences, at or about the same time [JA 40-47, 118-122, 167-171].[3] The cases were consolidated for review. On March 12, 1964, the first two applications for interlocutory injunction were denied, one judge dissenting [JA 251, 252]; on March 20, 1964, the remaining two applications (including petitioner's) were similarly denied, by a different panel, without a dissenting vote

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[2]Petitioner's case was docketed as No. 18477.

[3]Another conference filed as No. 18468, three joined in No. 18471, and two joined in No. 18475.

[JA 253, 254].[4] On August 20, 1964, the Court of Appeals, relying almost exclusively upon this Court's decision in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), entered the order from which the instant petition is taken, sustaining the Commission. Judge Miller dissented without opinion.

REASONS FOR GRANTING THE WRIT

I

THE CASE INVOLVES A QUESTION OF FUNDAMENTAL IMPORTANCE IN THE CONSTRUCTION OF FEDERAL REGULATORY STATUTES

A. In light of the court's holding below, this Court should reexamine the sweeping language of its decision in United States v. Morton Salt Co., 338 U.S. 632 (1950), to determine whether there remain any outer boundaries to an administrative agency's demands for information

Although on its own facts the decision of this Court in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), appeared to represent merely a logical step in the development of administrative law, the sweeping language of the opinion, albeit reasonable in context, has become, for administrative agencies, a carte blanche cover of authority for harassing demands virtually without limitation, and, for the lower federal courts, a stern proscription against judicial "interference" with the full exercise of such agency authority. *Morton Salt* is construed to authorize "fishing expeditions" and to confer upon the various Commissions the inherent powers of a grand jury.

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[4] As petitioner believes that, notwithstanding the denial, the penalties cannot lawfully have attached during the course of the appeal, no error is cited to this denial.

This petition does not present the comparatively simple problem of a federal administrative agency securing information required in policing compliance with its orders properly entered against a domestic enterprise. Here, the Federal Maritime Commission initiated "studies" on an industry-wide basis of both foreign and American steamship companies, covering alleged "disparities" between freight rates from the United States compared to freight rates to the United States in trades with the major maritime nations of the world. The Commission's demands were served upon steamship lines and conferences abroad as well as in the United States.

The Commission's orders, including the order directed to petitioner, aroused an immediate storm of diplomatic protests from other nations. Great Britain enacted special legislation to protect its jurisdiction against the demands. Other countries have taken similar action. Diplomatic negotiations have been in progress over the orders for many months without any final determination at this time. The Commission has suspended some of its orders pending the outcome of the diplomatic negotiations, but not this one.

The subject of the Commission's investigation or "study", *i.e.*, "rate disparities", was treated by the Congress apart from all other rate regulations in foreign commerce. Although all legislative controls over freight rates in foreign commerce are set forth in the Shipping Act, 1916, as amended, to which alone foreign carriers are subject, the Congress treated "rate disparities" only in the Merchant Marine Act of 1936 (46 U.S.C. §§ 1101 et seq.). Recognizing the delicate international problems

involved in unilateral control of international freight rates, Congress declined to delegate to the Commission any regulatory control over "rate disparities". All that was legislated on the subject was Section 212(f) of the 1936 Act (46 U.S.C. § 1122(f)),[5] limiting the Commission's authority in the field,

> "To investigate . . . and recommend to Congress measures by which such discrimination may be corrected."

Section 212(e) of the 1936 Act preempts the field entirely so far as the Commission's authority over "rate disparities" is concerned. Legislation has never been enacted making "rate disparities" unlawful.

Instead of investigating and recommending corrective measures to Congress, as it was "directed" to do in 1936, the Commission waited until 1964 to take any action at all. Then, in defiance of the international features of the problem that had deterred Congress from acting against "rate disparities" in 1936, the Commission served its unheralded Section 21 orders together with the accompanying letters "requesting" the shipping industry, including petitioners, (1) "to make appropriate adjustments in your tariffs"[6] *or*, (2) explain the alleged rate

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[5]Originally Section 212(e), 46 U.S.C. § 1122(e).

[6]When petitioners attempted to learn from the Commission what it meant by "appropriate adjustments", in view of petitioner's complete ignorance of the rates of other parties with which petitioner's rates were compared by the Commission [JA 235], the Chairman of the Commission answered that "the Commission has not determined that any of the rates in the Conference tariff are unlawful . . . ." and could not explain "what adjustments" it had asked petitioner to make in its tariff of freight rates [JA 236, 237].

disparities and comply with the demand for production of records involved in this petition.

The Commission's action aims at eliminating all "rate disparities" throughout the foreign commerce of the United States in lieu of investigating them and recommending corrective measures to the Congress. As the means to its end, the Commission "requested" "appropriate adjustments" only in freight rates from the United States ports to foreign ports. Although the Commission served production orders upon carriers and conferences from foreign ports to United States ports, it did not request "appropriate adjustments". The production order under review was not really a study at all but a penalty, invoked as an alternative form of compliance if petitioner failed "to make appropriate adjustments in [its] tariffs" as "requested" in the accompanying letter. While, in the aggregate, the Commission "requested" thousands of arbitrary rate adjustments, the Chairman of the Commission has reported only that, as a result of the Commission's inquiry, "the rate on Bourbon to England has been lowered to that of Scotch from England to the United States."[7]

The instant case represents an example of how far the dicta of *Morton Salt*, relied upon by the Commission, has strayed from its original framework. The order can be sustained, if at all, only on *Morton Salt's* ostensible sanction of unfettered "official curiosity"[8] and a boundless

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[7]Public Address delivered October 29, 1964, reported by *Congressional Information Bureau*, October 29, 1964, Vol. 68 Cargo—No. 220.

[8]338 U.S. at 652.

"power of inquisition . . . analogous to the Grand Jury".[9] As admitted on the very face of the order [see JA 188], its only purpose (except for the unauthorized one described above) was, in Mr. Justice Holmes' words, to "search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up."[10]

Although *Morton Salt,* in tracing the development of administrative law, noted the decline of the "colorful and nostalgic slogan 'no fishing expeditions,' "[11] petitioner cannot believe that the Court meant by this "to sweep" not only "all our traditions" but, as well, all prior case law, statutes and Constitution, "into the fire."[12] *Morton Salt* did not involve a "fishing expedition"; the present order admittedly and unabashedly does. It is not a "nostalgic slogan" which is concerned here, but a basic principle of American law. This Court should resolve whether or not the important legal principle still retains vitality, in the face of *Morton Salt* and its subsequent administrative construction.

B. The trend established by the Morton Salt dicta and the holding of the court below are entirely out of harmony with the principles behind the increasing confinement of governmental investigatory powers in analogous areas of the law

Since *Morton Salt,* the investigatory power of administrative agencies has steadily mounted to the point where, in the case below, an order has been sustained on

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[9]338 U.S. at 642.

[10]*Federal Trade Commission v. American Tobacco Co.,* 264 U.S. 298, 306 (1924), roundly condemning such a free-wheeling search as "contrary to the first principles of justice."

[11]338 U.S. at 642.

[12]*American Tobacco, supra,* note 10, 264 U.S. at 305-306.

no more showing than that the agency "needs" the information—to "determine what action"—out of a possible half-dozen, unrelated courses of action—"if any it should take." [JA 188]. Such a meaningless statement of purpose is scarce satisfaction of the "right to know *why* the inquiry is made."[13]

The trend in administrative law which has led to the sustaining of such an order is inconsistent with the development of the law in analogous areas, which seeks more and more to curb, not to foster, the autocratic exercise of investigatory power. A prime example is the confinement being placed on the investigatory power of the Congress itself,[14] in decisions ranging from *Watkins v. United States*, 354 U.S. 178 (1957), through *Russell v. United States*, 369 U.S. 749 (1962). Compare also the mounting judicial vigilance toward greater restraint in the field of penal law. *Elkins v. United States*, 364 U.S. 206 (1960); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Preston v. United States*, 370 U.S. 364 (1964).

It is inconceivable that this Court could have intended or foreseen that such an anomaly would develop whereby a creature of Congressional action should exercise broader inquisitorial powers than the Congress itself.

C. The trend since Morton Salt and the holding of the court below are contrary to both statutory and Constitutional law

Morton Salt recognized and reaffirmed the principle that a corporation is entitled to a measure of protection[15]

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[13] *Jones v. Securities and Exchange Commission*, 298 U.S. 1, 26 (1936) (supplying emphasis).

[14] Paradoxically, the creator being allowed less power than its creations.

[15] Albeit a less complete one than afforded to a private citizen.

from unreasonable searches and seizures, under the Fourth Amendment to the United States Constitution, which protection extends not only to literal takings but, as well, to the "orderly taking under compulsion of process."[16] But surely such an aimless search as evidenced by the instant order is nothing if not shockingly unreasonable.

Moreover, it is contrary to the declared intent of Congress, which, having traced the growth of the administrative process and finding (unlike the dicta of *Morton Salt)* all *not* "right with the world", enacted the Administrative Procedure Act,[17] to cure some of the more obvious abuses. As this Court acknowledged, also in *Morton Salt:*

> "The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. *It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights."* 338 U.S. at 644 (Emphasis supplied).

One such safeguard was provided by Section 6(b) of the Act,[18] which, in the words of the framers, was specifically designed *"to preclude* 'fishing expeditions.' "[19]

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[16]338 U.S. at 652.

[17]5 U.S.C. §§ 1001 et seq.

[18]"(b) *Investigations.*—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law." 5 U.S.C. §1005(b), first sentence.

[19]Report of the Senate Committee on the Judiciary, Sen. Doc. No. 248, 79th Cong., 2d Sess., 205 (1946) (supplying emphasis.)

Both Constitutional and Congressional mandates are destroyed if the present, admittedly "fishing" order, and the judicial policy of laissez-faire that upheld it under *Morton Salt,* have become the law of the land.

Morton Salt, although sustaining the order therein contested, recognized an outer limit to the burdens of officious snoopery in the name of "the public interest". Review should be granted to determine whether that limitation still exists, or whether the principles of *American Tobacco* have become a dead letter.

II.

THE CASE INVOLVES A QUESTION OF PARTICULAR IMPORTANCE TO THE ADMINISTRATION OF THE SHIPPING ACT OF 1916 OVER INTERNATIONAL COMMERCE.

A. The decision of the court below, in sustaining the use by the Federal Maritime Commission of a pre-complaint subpoena power, is in direct conflict with the carefully circumscribed powers granted to the agency by Congress.

Unlike the domestic regulatory statutes,[20] the Shipping Act, operating in the delicate arena of international relations, contains no provision either for visitorial inspection powers or for the power of production and dis-

[20]All of which, insofar as can be found, seem to possess the broader powers.

covery.[21] Section 27,[22] which contains the Act's only subpoena (or any other production) power, crisply and precisely limits the use of the power to "investigating *alleged violations*". No violations were alleged here. In contradistinction to this, the Federal Trade Commission Act, for example, authorizes the use of subpoenas duces tecum with respect to "any matter under investigation",[23] whether before or after an allegation of statutory violation. The Federal Trade Commission Act also contains (in Sections 6 and 9),[24] in common with other domestic statutes, but unlike the Shipping Act, a broad visitorial power.

Nor can the difference be explained away as a matter of Congressional oversight. In the hearings which led to the 1961 amendments to the Shipping Act,[25] the Federal Maritime Board, the agency then charged with the administration of this Act, expressly brought to Congress' attention the alleged "deficiency" in the statute, both as to the visitorial power and, specifically germane here, to the lack of a pre-complaint subpoena power.[26] In view of

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[21]The Ninth Circuit Court of Appeals has recently ruled that the Shipping Act does not authorize an order for the production and discovery of documents in a complaint proceeding. *Federal Maritime Commission v. Anglo-Canadian Shipping Co., Ltd.*, 335 F.2d 255 (9th Cir. 1964). A fortiori, the Act should not be construed to authorize a production and discovery order *before* complaint is filed.

[22]46 U.S.C. § 826.

[23]Section 9 of the Act, 15 U.S.C. § 49.

[24]15 U.S.C. §§46, 49.

[25]Public Law 87-346, which somewhat ambiguously reversed the effect of this Court's holding in *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481 (1958).

[26]See "Additional Recommendations" numbered 3 and 7, reported at pp. 23 and 25 of the Report of the House Committee on Merchant Marine and Fisheries, H.Rep. No. 498, 87th Cong., 1st Sess. (1961).

the power now claimed by the agency, in the instant order, the language of this latter request of the agency to the Congress bears quoting in full:

> "7. An appropriate provision should be inserted in the Shipping Act to *authorize the Board to conduct preliminary investigations* and in aid thereon, *to exercise the power of subpena*, to swear witnesses, and to take and record testimony *antecedent to the filing of any complaint* on the Board's own motion.
>
> "*The purpose of this provision is to enable the Board to conduct proceedings analogous to those of a grand jury.* A somewhat similar procedure is followed by the Federal Trade Commission under the authority vested in it in title 15, United States Code, section 49 and other sections of the Federal Trade Commission Act. While that act authorizes the Commission to file complaints charging violations thereof (15 United States Code, section 45(b)), other sections of the act authorize the Commission to invoke its powers in investigation of possible violations. *At present, the statute does not clearly authorize the Board to exercise its power of subpena in advance of a formal allegation of a violation of the act.* Where the Board becomes apprised of indications of a violation of the act, its investigation into the matter would be materially aided if it clearly were vested with the power to issue the subpenas compelling the attendance of witnesses and the production of papers before a properly designated investigating officer."[27]

The refusal of Congress to grant this request casts grave doubts on the validity of the instant order, accomplishing precisely the same result by another tortuous path.

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[27] *Ibid.*, p. 25 (emphasis supplied; footnote omitted).

For there should be no question that the order does not demand a "report" within the usual meaning of the term in the authorizing section of the statute, Section 21. It expressly calls for "production"—not the "filing" authorized by Section 21. Its demand is exclusively for documents—not data [See JA 189]. And in view of the order's admission that the Commission had not yet "determin[ed] what action if any it should take", there can be no reasonable doubt that the power sought to be exercised is that of pre-complaint subpoena, a power sought by the Commission in 1961 but denied by the Congress in the amendments of that year to the Shipping Act.

Erroneously relying on the imperfect analogy to domestic regulatory statutes, and judicial interpretations thereof,[28] the court below failed even to meet petitioners' argument, relegating it to a mere footnote [see p. 8 of the court's opinion, footnote 5].

B. Particularly in view of the importance of the distinction in the context of this specific statute, this Court should, again reexamining the breadth of language in Morton Salt, reestablish the line between a subpoena and a report.

In *Morton Salt*, and again in *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961), this Court sustained, more or less obliquely, the use of a "report-gathering" power as an alternative to the subpoena power. As noted, however, this line-blurring, was, in the context of the statute there being enforced, of no great consequence, since in any case the Federal Trade Commission's pre-

[28]Including, again, *Morton Salt*, and its own earlier decision, similarly relying in this respect on *Morton Salt, Montship Lines, Ltd. v. Federal Maritime Board*, 295 F.2d 147 (D.C.Cir. 1961).

complaint subpoena power would have extended just as far.

As shown, however, under the Shipping Act, the distinction is paramount. There is no pre-complaint subpoena power from which to analogize.

Notwithstanding this, and in purported reliance upon *Morton Salt*, this Commission has in recent years adopted a course of action for ferreting out all information, documents, records, what-have-you, not otherwise accessible to it, simply by declaring the matter a "report" and issuing an order for its "production", citing Section 21 of the Shipping Act. Having failed to comply with the Administrative Procedure Act's requirement that it establish and publish, in advance, "the nature and requirements", and "scope and contents" of all reports[29] to be ordered under Section 21, anything and everything may and does become a "report", to suit the whim of the moment. The Section 21 orders here illustrate the Commission's use of unlimited grand jury powers of investigation, not the limited, statutory powers of the Shipping Act, expressly confining all orders for the production of

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[29]Section 3(a), 5 U.S.C. § 1002(a), which states, in pertinent part: "(a) *Rules.*—Every Agency shall separately state and currently publish in the Federal Register . . . statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations . . . . No person shall in any manner be required to resort to organization or procedure not so published."

It is significant that the Federal Trade Commission had complied with this directive with respect to the report which was the subject of *Morton Salt*—as this Court expressly noted; see 338 U.S. at 644-646. On the other hand, the Maritime Commission brushes aside the Congressional will with a curt, "inapplicable" [JA 38].

documents to "the purpose of investigation of alleged violations of this Act". (Section 27, 46 U.S.C. §826).

In an earlier case involving the same statutory section, this Court rejected the contention that a Section 21 order should be used in place of a Section 27 subpoena, stating, "It is inconceivable" that the Congressional provision of both powers "is mere tautology." *Isbrandtsen-Moller Co. v. United States,* 300 U.S. 139, 144 (1937). By the same token, the Court should now reject the converse notion, embodied in the instant order and upheld by the Court of Appeals, that a Section 27 subpoena may be disguised as an order under Section 21 and thus extended far beyond its legitimate, carefully defined statutory role.

In *Morton Salt,* though sustaining the order there before it, this Court acknowledged:

> "Of course, *there are limits to what, in the name of reports, the Commission may demand.* Just what these limits are we do not attempt to define in the abstract . . . .
>
> ". . . [I]n upholding this order upon this record, we are not to be understood as holding such orders exempt from judicial examination *or as extending a license to exact as reports what would not reasonably be comprehended within that term as used by Congress in the context of this Act."* 338 U.S. at 653, 654.

The case before this Court is most certainly not in the abstract; the meaning of the term "report" as used by Congress in the context of the Shipping Act emphatically denies the use made of it here, to subpoena documents without alleging a violation of the Shipping Act. Unless the quoted words of this Court are but empty rhetoric, this is the place to "define" the "limits."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated at San Francisco, California, this 16th day of November, 1964.

Respectfully submitted,

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(Appendices A and B Follow)

Appendix A

OPINION OF THE COURT BELOW

United States Court of Appeals

For the District of Columbia Circuit

No. 18,468

Far East Conference, petitioner,

v.

Federal Maritime Commission and
United States of America, respondents

No. 18,471

North Atlantic Baltic Freight Conference, et al.,
petitioners,

v.

Federal Maritime Commission and
United States of America, respondents

No. 18,475

North Atlantic Continental Freight Conference,
et al., petitioners,

v.

Federal Maritime Commission and
United States of America, respondents

No. 18,477

Pacific Coast European Conference, petitioner,

v.

Federal Maritime Commission and
United States of America, respondents

No. 18,518

Far East Conference, petitioner,

v.

Federal Maritime Commission and
United States of America, respondents

Consolidated Petitions for Review of Orders of the Federal Maritime Commission

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Decided August 20, 1964

Mr. Elkan Turk, Jr., with whom *Mr. Seymour H. Kligler* was on the brief, for petitioner in Nos. 18,468 and 18,518.

Mr. Burton H. White, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Arthur E. Tarantino* was on the brief, for petitioners in Nos. 18,471 and 18,475.

Mr. Charles F. Warren for petitioner in No. 18,477.

Mr. Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission, with whom Assistant Attorney General *William H. Orrick, Jr., Messrs. James L. Pimper,* General Counsel, Federal Maritime Commission, and *Irwin A. Seibel,* Attorney, Department of Justice, were on the brief, for respondents.

Before Wilbur K. Miller, Fahy and Wright, *Circuit Judges.*

Fahy, *Circuit Judge:* Nos. 18,468, 18,471, 18,475 and 18,477 may be considered together. Each case is a petition by one or more steamship Conferences, composed of common carriers by water and organized under agreements approved by the Federal Maritime Commission under Section 15 of the Shipping Act of 1916, as amended, 75 Stat. 763, 46 U.S.C. § 814 (Supp. IV, 1961), to review orders of the Commission issued under the authority the Commission claims by reason of Section 21 of the Act.[1]

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[1]Appeals from similar orders directed to other Conferences and involving different trade routes and commodities were previously filed in the Ninth Circuit. For that reason the Commission contends that this court is required to transfer these proceedings to the Ninth Circuit under 28 U.S.C. § 2112(a). That section provides that when proceedings are instituted in two or more courts of appeals with respect to the same agency order the agency shall file the record in that court in which such proceedings were first instituted and the other courts shall thereupon transfer the proceedings concerning such order to the court in which the record has been filed. We do not think that this section is here applicable; for although the requests for production in the orders involved in these cases and the orders appealed from in the Ninth Circuit are substantially identical, the orders themselves cannot be considered the "same order" within the meaning of the statute. Moreover, assuming that aside from the statute it is within the inherent power of the court to transfer the cases in the interest of sound judicial administration, we do not think that this case is an appro-

The orders are not related to any proceeding pending before the Commission on a complaint, but have been issued as part of a "Foreign Trade Study" by the Commission. Section 21 authorizes the Commission to

> require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath, whenever the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary,

followed by penalty provisions for non-compliance. 39 Stat. 736 (1916), 46 U.S.C. § 820 (1958).

Only Part I of the orders is involved.[2] It requires each Conference, as agent for its common carrier members, to produce at the Commission's offices in Washington, D.C., as follows:

> a. A copy of any letters, memoranda, circulars, and other correspondence or documents exchanged between the conference and any of its common carrier member lines and/or any of their agents, during the period January 1, 1962 through September 30, 1963, relating to rates on any of the commodities listed in Attachment A hereto. Documents which merely list or state such rates without discussion need not be furnished.
>
> b. A copy of any reports, studies, analyses or documents compiled by or for or received by the con-

priate one for the exercise of such power since the appeals filed in the Ninth Circuit have already been disposed of by that court.

[2]Other parts of the orders as originally issued have been suspended by Commission order of February 26, 1964.

ference between January 1, 1959 and September 30, 1963, with respect to all rates charged by the conference. Documents which merely list or state such rates without discussion need not be furnished.

Whenever any of the foregoing information has been otherwise furnished to the Commission, at the request of the Commission, a statement to that effect identifying the matter filed and the time of such filing, may be submitted in lieu of the matter requested.

This request was preceded by a recitation of the requirements of certain provisions of the Shipping Act[3] and a

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[3]This part of the order reads as follows:

Under various provisions of the Shipping Act, 1916, and the Merchant Marine Act, 1936, the Commission is charged with certain regulatory responsibilities with respect to rates and practices of common carriers in the waterborne foreign commerce of the United States.

Section 15 of the Shipping Act, 1916, requires, among other things, that the Commission disapprove, cancel, or modify agreements found to be unjustly discriminatory or unfair as between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States or to be contrary to the public interest. Section 17 of the Shipping Act, 1916, prohibits common carriers by water in the foreign commerce of the United States from charging rates or fares which are unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Section 18(b)(5) of the Shipping Act, 1916, requires that the Commission disapprove rates found to be so unreasonably high or low as to be detrimental to the commerce of the United States.

Under Section 212(e) of the Merchant Marine Act, 1936, the Commission is required to investigate rates whereby shippers from the United States pay a higher rate from a United States port to a foreign port than the rate charged

statement that production of the requested data was necessary "in order that the Commission may be properly informed as to matters bearing upon its responsibilities under these statutory provisions, and to determine what action if any it should take pursuant to such statutory provisions. . . ."

Accompanying each order was a letter from the Chairman of the Commission stating that certain rates and charges applicable to cargo from certain ports of the United States to certain foreign ports exceeded those applicable to cargo from the foreign ports to ports of the United States, particularly with respect to the commodities listed in Attachment A to the orders; and that the Commission was considering institution of an investigation of the matter pursuant to Section 212(e) of the Merchant Marine Act, 1936, and/or rate proceedings to determine the issue of the detrimental character of the rates within the meaning of Section 18(a) (5) of the Shipping Act, 1916, as amended. The letter continued,

> Prior to the institution of proceedings pursuant to the aforementioned statutory provisions, and if possible to obviate the necessity therefor, we request that you take immediate steps to make appropriate adjustments in your tariffs, particularly with respect to the rates on the commodities enumerated in Attachment A, or that you submit to the Commission statements setting forth all facts and conditions which explain or justify the higher export rates published by your conference. We request your compliance with the foregoing on or before December 15, 1963. For the purpose of evaluating your statement and determining whether formal proceedings should be instituted, the Commission is also requiring that you furnish the information described in the accom-

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by the same carrier on similar cargo from such foreign port to such United States port, and to recommend to Congress measures by which such discrimination may be corrected.

panying order issued pursuant to Section 21 of the Shipping Act, 1916.[4]

The question is whether the orders are valid. We note first the contention, pressed in No. 18,477, that the letter accompanying the order demonstrates that the Commission's purpose was to force a reduction in rates by requiring the Conferences to "reduce or produce", and that such a coercive tactic constitutes an invalid exercise of administrative authority. We can find no such coercive purpose in the combination of the order and the letter since, as we view the matter, the information requested was to be supplied whether or not the letter itself led to the rate adjustments suggested. We have the question whether the orders are valid, not the letters. We cannot hold the orders invalid if, considered apart from the letters, they are within the Commission's authority. *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 145 (1937).

As to this we bear in mind the broad regulatory responsibilities of the Commission, considered with the exemption enjoyed by the Conferences from the antitrust laws by reason of Commission approval of Conference agreements. See *Isbrandtsen Co. v. United States*, 93 U.S.App.D.C. 293, 297, 211 F.2d 51, 55, *cert. denied, Federal Maritime Board v. United States*, 347 U.S. 990 (1954). Within these broad responsibilities is lodged the specific authority here sought to be exercised. As to this we cannot accept petitioners' suggestion that Section 21 orders must be limited to complaint proceedings. They are available to aid investigation without the need for the

[4]By orders of March 12, 1964, March 20, 1964, and April 22, 1964, this court denied the applications of petitioners for interlocutory injunctions restraining enforcement of the Commission's orders pending final determination of the petitions to review. The orders of March 12 also dissolved orders previously entered by this court staying the effectiveness of the Commission's orders in Nos. 18,468 and 18,471.

support of a charge of violation of the Act, or belief even that such a violation is probable. *Isbrandtsen-Moller Co. v. United States, supra* at 144. In this respect the discussion by the Supreme Court in *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), is applicable, though that case involved the investigatory powers of the Federal Trade Commission and not of the Maritime Commission. And see *Pacific Westbound Conf. v. United States*, ___ F.2d ___ (9th Cir. 1964). *Cf. Montship Lines, Ltd. v. Federal Maritime Board*, 111 U.S.App.D.C. 160, 166, 295 F.2d 147, 153 (1961).

We need not discuss whether or not the data demanded, if the demand is otherwise valid, is of the type obtainable under Section 21, namely, "any periodica or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act"; for petitioners accept the view of the Commission in this respect. At least they do not dispute it in these cases, no doubt in part because of the views expressed by this court in *Montship, supra*, as to the broad construction to be given the enumeration in Section 21 of the kind of data the Commission may require.[5]

There is a contention, however, that a Conference is not an entity to which a Section 21 order may be applied. That section is applicable to "any common carrier by water" or "other person subject to this Act," or "any officer, receiver, trustee, lessee, agent or employee" thereof. The fact is that the Conferences are in many respects agents of the carriers which compose them. If the

[5]Petitioners, however, do contend that an order "to produce" is not authorized by Section 21 since that section literally requires a carrier only "to file" the requested data. Whatever the difference between producing and filing, we think this contention was disposed of by this court's opinion in *Montship, supra*.

Conferences are in possession of the data, and the data is otherwise validly sought, it may not be refused on the theory the Conferences are not answerable to a Section 21 order.

Petitioners also contend that the orders are invalid because the data sought is not reasonably related to the Commission's statutory authority over rates in foreign commerce. They claim that the Commission's only source of control over such rates is Section 18(b)(5) which requires Commission disapproval of rates found "to be so unreasonably high or low as to be detrimental to the commerce of the United States," and under this limited statutory authority the Commission is concerned only with the effect of rates, not with the rate-making processes to which the requested data relates. As we read the statute, however, the Commission's concern is not solely with the detrimental effect of rates on the commerce of the United States but also with the reasonableness of rates, to which the information sought is related. We have in mind also the command of Section 212(e) which directs the Commission to investigate disparities between import and export rates and to recommend to Congress measures by which such discrimination may be corrected.

A principal argument of petitioners is based on the decisions of this court in the *Montship* case, and in *Hellenic Lines, Ltd.* v. *Federal Maritime Board,* 111 U.S. App.D.C. 151, 295 F.2d 138 (1961), which held the Section 21 orders then before the court to be invalid because they were set forth in such general terms that no standard existed by which to determine the relevancy of the information demanded, a defect which bore upon the reasonableness of the orders. Here, however, the purposes are set forth with reference to particular sections of the statute and the need of the Commission for the information in order "that the Commission may be properly informed as to the matters bearing upon" the responsibilities im-

posed upon it by the sections thus referred to. This is clearly an effort by the Commission to meet the defect pointed out in our *Montship* and *Hellenic Lines* decisions, and, like the Ninth Circuit in its recent decision in *Pacific Westbound,* we think the effort has succeeded and that the stated purposes of the order show the relevancy of the data sought. The requirements to be met in the investigatory area of administrative agencies, stated in general terms in the *Morton Salt* case, seem to us to be satisfied in this case:

> [I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 338 U.S. 632, 652.

A word now as to the possible oppressiveness of the demand to produce, that is, the difficulty of compliance in relation to the need of the Commission to obtain the information. We have no basis in the record for finding oppressiveness. We rely upon the prudence and reasonableness of the Commission in cooperating with the Conferences in the manner of complying. *Cf. United States* v. *Morton Salt Co., supra* at 653.

No. 18,518. Aside from matters above disposed of, in this case Far East Conference challenges a Section 21 order demanding the data which is described in the copy of the order which is set forth as an Appendix to this opinion. As appears therefrom the data demanded relates to requests and complaints of shippers. Section 15 of the Shipping Act of 1916 was amended in 1961, 75 Stat. 764. 46 U.S.C. § 814 (Supp. IV, 1961), by adding a provision as follows:

> The Commission shall disapprove any such [Section 15] agreement, after notice and hearing, on a finding of . . . failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

The order recites that the Commission needs the data

sought so as to be adequately informed as to matters bearing upon its responsibilities under this statutory provision. The objection of petitioner is that the statute vests authority in the Commission with respect to reasonable procedures for hearing and considering shippers' requests and complaints, whereas the order seeks data not as to procedures but as to requests and complaints made, and action taken in connection therewith. But it seems quite clear to us that the Commission in ascertaining whether or not the Conference has adopted and is maintaining reasonable procedures respecting requests and complaints of shippers is entitled to find out what requests and complaints have been made and what disposition has been made of them. The information requested is designed to inform the Commission as to this.

In all the cases we have not neglected to consider Section 6(b) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. § 1005(b) (1958), limiting an agency in demanding reports and making investigations except as the agency may be authorized by law. Being of opinion that the orders are authorized by law, it follows we find Section 6(b) no bar to them.

Affirmed.

Circuit Judge WILBUR K. MILLER dissents.

APPENDIX

Section 21 Order

STUDY—CONFERENCE PROCEDURES FOR HEARING AND CONSIDERING SHIPPERS' REQUESTS AND COMPLAINTS

Section 15 of the Shipping Act, 1916, requires, among other things that the Commission disapprove any agreement between parties subject to that Act on a finding of

failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

In order that the Commission may be adequately informed as to matters bearing upon its responsibilities under this statutory provision, and to determine what action, if any, it should take under this provision, it is necessary that the conference named herein furnish the Commission with the information hereinafter specified.

Now Therefore, pursuant to the authority vested in it under Section 21 of the Shipping Act, 1916, the Commission hereby orders The Far East Conference (Agreement No. 17), as agent for each of the member lines thereof, to produce at the Commission's offices in Washington, D. C., not later than January 22, 1964 the following:

1. A copy, or if oral, a complete statement of each request and/or complaint filed during the period July 1, 1963 to December 31, 1963; inclusive.

2. Copies of all interim correspondence and memoranda including all inter-office memoranda and correspondence between the conference and carriers and any report or studies pertaining to each individual request and/or complaint mentioned in Paragraph 1 above.

3. A copy, or if oral, a complete statement of each notice to shippers advising of actions taken in connection with such requests and complaints.

4. A brief resume to accompany the above setting forth the date received, the name and address of the party, the nature of the request or complaint, the date of disposition, the method of disposition, and if denied, the reason for such denial.

Whenever any of the foregoing information has been otherwise furnished to the Commission, at the request of the Commission, a statement to that effect, identifying the matter filed and the time of such filing, may be submitted in lieu of the matter requested.

By Commission December 27, 1963

Francis C. Hurney
for Thomas Lisi
Secretary

Appendix B

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes

Shipping Act, 1916, 46 U.S.C. §§801 et seq.:

Section 21, 46 U.S.C. §820:

> The Federal Maritime Board and the Secretary of Commerce [now, Federal Maritime Commission] may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

Section 27, 46 U.S.C. § 826:

For the purpose of investigating alleged violations of this chapter, the Federal Maritime Board may by subpoena compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing. Subpoenas may be signed by any member of the Board, and oaths or affirmations may be administered, witnesses examined, and evidence received by any member or examiner, or, under the direction of the Board, by any person authorized under the laws of the United States or of any State, Territory, District, or possession thereof to administer oaths. Persons so acting under the direction of the Board and witnesses shall, unless employees of the Board, be entitled to the same fees and mileage as in the courts of the United States. Obedience to any such subpoena shall, on application by the Board, be enforced as are orders of the Board other than for the payment of money.

Merchant Marine Act, 1936, 46 U.S.C. §§1101 et seq.:

Section 212(f), 46 U.S.C. §1122(f):

The Federal Maritime Board is authorized and directed—

(f) To investigate, under the regulatory powers transferred to it by this chapter, any and all discrimi-

natory rates, charges, classifications, and practices whereby exporters and shippers of cargo originating in the United States are required by any common carrier by water in the foreign trade of the United States to pay a higher rate from any United States port to a foreign port than the rate charged by such carrier on similar cargo from such foreign port to such United States port, and recommend to Congress measures by which such discrimination may be corrected.

Administrative Procedure Act, 5 U.S.C. §§1001 et seq.:
Section 2(a), 5 U.S.C. §1002(a):

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

Section 6(b), 5 U.S.C. §1005(b):

Except as otherwise provided in this Act—

(b) No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner of for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

Federal Trade Commission Act, 15 U.S.C. §§41 et seq.:
Section 6, 15 U.S.C. §46:

The commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such re-

ports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

[Sections 6(c)—6(h) omitted].

Section 9, 15 U.S.C. §49:

For the purposes of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other

person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of sections 41-46 and 47-58 of this title or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under said sections at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence

before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 703

FAR EAST CONFERENCE,

Petitioner,

—v.—

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

FAR EAST CONFERENCE,

Petitioner,

—v.—

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, dated August 20, 1964, and the judgment entered thereon, affirming orders of the Federal Maritime Commission dated December 19, 1963.

We point out that Petitioner has joined with other parties to the litigation below in a petition (No. 699) to review the same decision insofar as it affirmed orders of the Federal Maritime Commission issued on the purported authority of §21 of the Shipping Act, 1916. Those orders were of like tenor and related to rate matters in foreign commerce of the United States.

The decision below, in addition, disposed of a separate petition for review of a different §21 order addressed to the present Petitioner and designated in the court below Case No. 18,518. This petition for a writ of certiorari is filed in order to assure that the granting of a writ of certiorari to review the decision of the Court of Appeals will include a review of that decision insofar as it disposed favorably to the Maritime Commission of Case No. 18,518 below.

Opinion Below

The opinion and decision of the Court of Appeals, not yet reported, is printed, *infra,* in Appendix A.

Jurisdiction

The decision of the Court of Appeals was handed down and judgment thereon entered on August 20, 1964. The jurisdiction of this Court is invoked under §10 of the Judicial Review Act (Federal Agencies), 64 Stat. 1132 (5 U.S.C. §1040), and 28 U.S.C. §1254.

Questions Presented

1. Does the Federal Maritime Commission's order seeking detailed information including both copies of correspondence between the Petitioner and all of its patrons and memoranda of oral communications between Petitioner and its patrons, reasonably relate to any matter over which the Commission has jurisdiction?

2. Does the Commission's order on the purported authority of §21 of the Shipping Act, 1916, satisfy the requirements of §6 of the Administrative Procedure Act?

3. Does the Commission's order contain a statement of purpose sufficient to permit a determination of the relevancy and reasonableness of the information sought, and, therefore, to satisfy the requirements of Amendment IV to the Constitution of the United States?

Statutes Involved

The constitutional and statutory provisions involved are: Amendment IV to the Constitution of the United States; §15 of the Shipping Act 1916, 39 Stat. 733, as amended by 75 Stat. 763 (46 U.S.C. §814); §21, Shipping Act, 1916, 39 Stat. 736 (46 U.S.C. §820); §§2, 4 and 10 of the Judicial Review Act (Federal Agencies), 64 Stat. 1129, as amended, 1130 and 1132 (5 U.S.C. §§1032, 1034 and 1040); and §6 of the Administrative Procedure Act, 60 Stat. 240 (5 U.S.C. §1005). Because these provisions are lengthy, they are set forth in Appendix B.

Statement

Petitioner (hereinafter, the "Conference") is a rate-making association of common carriers by water in the foreign commerce of the United States, operating under an agreement approved by the Federal Maritime Commission or its predecessor agencies pursuant to §15 of the Shipping Act, 1916, as amended, 75 Stat. 763 (46 U.S.C. §814).

Pursuant to this agreement the Conference establishes tariffs of ocean freight rates, which are filed with the Commision in accordance with §18(b)(1) of the Shipping Act. The member carriers undertake to assess and apply these rates on cargoes carried by them in the export trades from the United States covered by the conference agreement.

On December 27, 1963, th Federal Maritime Commission issued an order, purportedly under §21 of the Shipping Act, 1916, which was served upon the Conference (R. 3-4).[1]

The Order under review starts with a paraphrase of a small portion of §15 of the Shipping Act, 1916, as amended, 75 Stat. 763 (46 U.S.C. §814). It states that the portion of the section referred to requires that the Commission disapprove any agreement between parties subject to the Shipping Act on a finding of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints. The second paragraph of the Order contains the only statement of the Order's purpose. It is as follows:

> "In order that the Commission may be adequately informed as to matters bearing upon its responsibilities under this statutory provision, and to determine what action, if any, it should take under this provision, it is necessary that the conference named herein furnish the Commission with the information hereinafter specified."

---

[1] References marked "R." are to pages of the Joint Appendix constituting the record in the court below, copies of which are being filed in this Court.

Thereupon the Order directs the Far East Conference to produce at the Commission's offices in Washington, D. C., the following:

> "1. A copy, or if oral, a complete statement of each request and/or complaint filed during the period July 1, 1963 to December 31, 1963; inclusive.
>
> "2. Copies of all interim correspondence and memoranda including all inter-office memoranda and correspondence between the conference and carriers and any report or studies pertaining to each individual request and/or complaint mentioned in Paragraph 1 above.
>
> "3. A copy, or if oral, a complete statement of each notice to shippers advising of actions taken in connection with such requests and complaints.
>
> "4. A brief resume to accompany the above setting forth the date received, the name and address of the party, the nature of the request or complaint, the date of disposition, the method of disposition, and if denied, the reason for such denial."

The concluding paragraph of the Order excuses the production of information which has otherwise been furnished to the Commission at its request.

The Order was not the first request received by the Far East Conference for approximately the same data. On October 23, 1963, the Commission had telegraphed to the Conference requesting substantially the same information, with no statement of the purpose therefor (R. 39). On October 31, 1963, the Con-

ference received from the Commission a letter confirming the telegram (R. 39-40). The letter advised that under §15, as amended, the Commission is required to survey and evaluate procedures used by conferences to insure that such procedures are adequate to afford shippers a prompt and fair hearing on their requests and complaints. This is indeed a quite different paraphrase of the language of §15 from that which ultimately appeared in the Order under review. The letter renewed the telegraphic request for data, asserting that the Commission viewed the matter "with the utmost concern" because of "Congressional concern regarding the disparity of rates in the foreign commerce of the United States and other matters pertaining thereto". Thus, the letter itself contained a second and quite inconsistent statement of purpose for the requested information. Disparity of freight rates is an expression of inexact significance. No system of common carrier tariffs involves the charging of the same rate for all transportation. In a sense, every tariff involves disparities of rates. The conditions which give rise to differences in rates for different transportation services and for different items of traffic have nothing to do with the promptness or fairness with which the carriers or conferences of carriers hear and dispose of complaints and requests from their patrons. However, the purpose of the letter was even more remote. It was not the Commission's purpose but apparently the purpose of someone or some group in Congress.

The next step in the chain of events leading to the issuance of the order occurred on November 1, 1963, when the Commission caused to be published a notice of proposed rule making (28 F.R. 11698). The pro-

posed rule referred to amended §15 of the Shipping Act and asserted the Commission's responsibility thereunder as follows:

> "(b) It is the responsibility of the Commission to see that the basic minimal requirements deemed necessary to accomplish this end are instituted and to maintain a continuing surveillance over the conferences and other rate-fixing agreements to insure that reasonable procedures are observed."

Here we find a new departure in the statement of the Commission's responsibilities under the complaints and requests provision of §15 which introduces objectives not readily apparent from a reading of the statutory language, *i. e.,* the establishment by the Commission of basic minimal requirements for reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints; nor does the statute literally oblige the Commission "to maintain a continuing surveillance over the conferences and other rate-fixing agreements to insure that reasonable procedures are observed".

Premised upon this conception of its duties, the Commission's proposed rule, after requiring all conferences, including the petitioner, to file with the Commission a statement outlining their procedures for handling shippers' requests and complaints, in §527.3, would require quarterly reports:

> "* * * covering all shippers' requests and complaints received and/or disposed of during the preceding three-month period, such report to include the following information:
>
> "(a) Date request or complaint was received.

"(b) Identity of the person or firm submitting the request or complaint.

"(c) Nature of request or complaint, i. e., rate reduction, rate establishment, classification, overcharge, undercharge, measurement, etc.

"(d) Date final action was taken and nature thereof.

"(e) If denied, the reason.

"Such report shall be accompanied by copies, or if oral, a statement setting forth complete details, of all such requests and complaints together with copies of the notices to shippers of advice as to action taken thereon. If said notice of advice as to action taken is oral, a complete statement thereof shall be filed with the Commission."

It was against this background that the §21 order under review was issued. After the current fashion (see the §21 orders involved in No. 699), the order is entitled, "Study—Conference Procedures For Hearing And Considering Shippers' Requests And Complaints".

The Far East Conference currently establishes the rates and charges of its member lines, and the rules and regulations governing their application, in connection with transportation of property from Atlantic and Gulf Coast ports of the United States to ports in Japan, Korea, Taiwan (Formosa), Siberia, Manchuria, China, Hong Kong, Vietnam, Laos and Cambodia (the territories formerly known as Indo-China), and the Republic of the Philippines. The membership of

the Conference currently includes members whose vessels fly the flags of the United States, Japan, the Republic of the Philippines, the Kingdom of Norway, and the Kingdom of Denmark.

The Far East Conference tariff contains more than 550 numbered tariff items to which thousands of articles of commerce are indexed for rate purposes. The Conference, at the times relevant to this proceeding, had contracts with over 5,000 exporters with whom it may have had correspondence or oral communications relating to rate matters (R. 44). It would require a review of all of the Conference files to determine whether they contain any communications which answer the description of the documents sought in the order. It would also require interrogation of half-a-dozen Conference employees regarding their telephonic and face-to-face conversations with shippers' representatives to determine whether any of those conversations fall within the scope of the order. Compliance would then require the copying of the documents, the preparation of memoranda of the conversations, and the preparation of an exhibit containing a detailed recapitulation of all of the foregoing.

All of this labor and disclosure of business data which are private and confidential, not only to the Conference, but to the merchants (who usually set forth highly prized pricing data in connection with their requests for rate adjustments), is required for no reason, or for a number of conflicting reasons. The most recent justification advanced for the requirement was given by the Chairman of the Commission, according to an article appearing in the New York Journal

of Commerce on Monday, January 13th, 1964, at page 28. The article states (R. 13):

> "Adm. John Harllee, chairman of the FMC, announced yesterday that 40 other conferences supplied the data, which 'is needed to answer a direct request of the joint economic committee'."

The question here really is whether the boundaries of legitimate information-gathering have become so blurred that they are no longer visible, with the result that the Commission can seek any data which it requests without any justification against which the reasonableness of its demands may be determined.

Because the consequences of compliance with the Commission's orders were of far-reaching importance, the Conference filed a petition to review in the Court of Appeals for the District of Columbia Circuit under §§2 and 4 of the Judicial Review Act (Federal Agencies), 64 Stat. 1129, 1130 (5 U.S.C. §1032 and 1034). (R. 20.) The Court of Appeals denied an application for a stay under date of April 3, 1964, and set an expedited schedule for briefing and argument. (R. 46.) The case was argued and, on August 20, 1960, the Court rendered an opinion (Appendix A) in favor of the Federal Maritime Commission, Judge Miller dissenting.

Reasons for Granting the Writ

I. The Questions Presented Are Important for the Administration of the Shipping Act and of Regulatory Statutes Generally

Viewed solely as an interpretation of the information-gathering powers of the Federal Maritime Commission under Section 21 of the Shipping Act, the decision below affects the rights of more than 400 common carriers by water serving United States foreign commerce.[2] Most of those carriers are members of one or more of the 120 steamship conferences establishing freight rates in the numerous and diverse trade routes on which that commerce flows. Their vessels fly the flags of all the principal maritime countries of the world and of many of the emerging nations seeking to establish themselves in the maritime field. The increasing extent to which the United States regulatory activity unilaterally burdens ocean-borne commerce among nations is a matter of grave concern to those carriers, to the countries where their vessels are registered, and to the nations whose foreign commerce is also the foreign commerce of the United States.

However, even broader considerations are involved. The ever-increasing scope of intervention by federal

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[2] The Section 21 orders involved in the *Montship* and *Kerr* cases were addressed to more than 400 carriers believed by the Commission's predecessor to be subject to the Shipping Act. [*Montship Lines Limited* v. *Federal Maritime Board*, 111 App. D.C. 160, 295 F.2d 147 (1961); *Kerr S.S. Co.* v. *United States*, 284 F.2d 61 (2nd Cir. 1960), certiorari granted and remanded with directions to dismiss as moot, 369 U.S. 422 (1962)].

agencies into the day-to-day activities of regulated industries is a matter of critical importance to all persons entitled to the protection afforded by the Constitution and the Administrative Procedure Act. As a consequence, there is an urgent need for further definition of the judicially enforceable limits upon the inquisitorial powers of administrative agencies.

II. The Court of Appeals Appears to Have Erred in Departing from Its Own Recent Decisions That §21 Orders Which Lack an Adequate Statement of Purpose Contravene Amendment IV to the Constitution of the United States

The opinion below treated the review of the shippers' requests and complaints order separately from the others only with respect to the contention that the information sought was irrelevant to the Commission's authorized functions. (Appendix A, pp. 11a-12a). Accordingly, for our points with respect to the questions under Amendment IV to the Constitution of the United States and §6(b) of the Administrative Procedure Act, 60 Stat. 240 (5 U.S.C. §1005(b)), we respectfully refer this Court to pp. 12-16 of the petition for a writ of certiorari filed by the Far East Conference and five Transatlantic Conferences, seeking review of the decision below as it relates to the "Foreign Trade Study" orders (No. 699).

We do point out that in *Hellenic Lines Limited* v. *Federal Maritime Board,* 111 App. D.C. 151, 295 F.2d 138 (1961), a different panel of the court below held invalid, on constitutional grounds, a §21 order of the Commission's predecessor for the reason that its state-

ment of purpose was inadequate to serve as a standard of relevancy and, hence, reasonableness. That there is no distinguishing difference between the present order and the *Hellenic Lines* order is, we submit, demonstrated by the following comparison of their respective purported statements of purpose:

The Present Order	*Hellenic Lines* Order
"In order that the Commission may be adequately informed as to matters bearing upon its responsibilities under this statutory provision, and to determine what action, if any, it should take under this provision, it is necessary that the conference named herein furnish the Commission with the information hereinafter specified."	"That pursuant to the responsibilities vested in the Board by the aforementioned Shipping Act, 1916, and in the effectuation in the public interest of the Board's regulatory duties under that Act, the Board needs the reports, accounts, records, rates, charges and memoranda of facts and transactions hereinafter described * * *."

III. In Holding the Information Here Sought to Be Relevant to Authorized Functions of the Commission, the Court of Appeals Gave to Amended §15 of the Shipping Act an Excessively Broad Interpretation

By Pub. L. 87-346, §15 of the Shipping Act was, in 1961, amended [75 Stat. 763 (46 U.S.C. §814)] by inserting the following provision among others:

> "The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it,

> or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints,"

The statutory language is as eloquent in what it omits to say as it is in what it says. It does not authorize the Commission to disapprove conference agreements because the conference has not promptly or fairly heard or considered a particular shipper's request or complaint. It does not establish a procedure which conferences must adopt and maintain for the consideration of shippers' requests and complaints. It does not direct the Commission to establish a standard procedure for conferences in the consideration of shippers' requests and complaints. The only thing that it does authorize the Commission to do is, after notice and hearing, and a finding of failure or refusal to adopt and maintain reasonable *procedures* for promptly and fairly hearing and considering shippers' requests and complaints, to disapprove the conference agreement concerned.

The legislative history of the 1961 amendments confirms that the exclusive concern was with procedures. Thus the House Merchant Marine and Fisheries Committee explained this provision on the ground that the committee's hearings "established that some conferences were devoting less than a reasonable amount of attention to the problem of their shippers, and that under the 1916 Shipping Act the shippers had incomplete recourse." H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961) 11.

If the Commission has reason to suspect that the Far East Conference has not adopted or is not main-

taining such procedures, the proper course under the statute is to give notice and conduct a hearing to determine whether the suspicion is well-founded. At the hearing, the relevant evidence would be that which demonstrated the procedures, if any, followed by the Conference. If, under the most liberal doctrine regarding administrative fact-gathering, the Commission merely wishes to satisfy itself that the Far East Conference is not violating the law, it should seek information related to the adoption and maintenance by the Conference of reasonable *procedures* relating to the hearing and consideration of shippers' requests and complaints.

The Order under review is entirely inapt for either of these sensible and proper procedures. It makes no inquiry whatsoever regarding the procedures adopted and maintained by the petitioner for hearing and considering shippers' requests and complaints. Rather, it seeks a host of minutiae in relation to specific shipper requests and complaints, both written and oral. Whatever might be the relevancy of these gleanings, if the Commission had some authority with respect to conference action on specific requests and complaints, they are of no value whatsoever in elucidating the conference procedures.

The Court of Appeals does not appear to have dealt with this contention. It merely stated (Appendix A, pp. 11a-12a) that it seems clear that, in ascertaining conference procedures for handling shippers' requests and complaints, the Commission "is entitled" to find out what requests and complaints have been made and what disposition has been made

of them. We submit that this is no answer to our argument. Even if the Commission might have some business, after ascertaining a Conference's procedure, for determining whether a particular complaint or request was handled in accordance with that procedure —a point we concede *arguendo* only—information as to specific complaints and requests and their disposition can have no purpose until the nature of the conference procedure has been ascertained. That inquiry is not advanced in the least degree by the information sought in the present order (Appendix A, pp. 12a-13a).

As we have intimated above, various Commission utterances *dehors* the Order have advanced reasons for its issuance. These vary from the need of the Commission to survey conference complaint and request procedures to expressions of congressional concern regarding rate disparities and procedures for handling shipper complaints (R. 12, 13). Even if the making of a "survey"—or a "study"—with no definite objective contemplated by the Shipping Act, were a proper justification for a §21 order, it would be defective in the present case for the reason pointed out above, namely, that the information requested does not relate to conference procedures.

If the purpose of the Order is to satisfy a congressional concern, it is a purpose not within the powers conferred upon the Commission. The Shipping Act certainly does not authorize the Commission to conduct an information-gathering circus for the edification of congressional committees and, hopefully, for the creation of an appearance of frantic regulatory activity.

If the purpose is the use of the Commission's powers under §21 as a means of obtaining from the petitioner information desired by a congressional committee, it is equally improper. The Commission is granted no power to gather information at the request of or for transmittal to Congress or any committee thereof.

The power of an agency to use its information-gathering process on behalf of a congressional committee should not be lightly conferred or implied. The criteria for valid exercise of congressional powers of compulsory process and the rights of parties summoned to produce information before congressional committees are quite different from the correlative powers and rights in relation to administrative procedures. See, *e.g., United States* v. *Tobin,* 195 F. Supp. 598 (D.C. 1961), rev'd and rehearing *en banc* denied *sub nom., Tobin* v. *United States,* 113 App. D.C. 110, 306 F. 2d 270, 274-6, cert. denied *sub nom., United States* v. *Tobin,* 371 U.S. 902 (1962). Congressional committees should not be permitted to circumvent the appropriate limitations upon their fact-gathering powers by inducing regulatory agencies to become their intelligence agents. By the same token, agencies should not be permitted to curry favor with Congress, at the expense of the regulated parties, by lending their facilities to the scheme of circumvention.

Not only does the Order fail to state any purpose; it can have no lawful purpose at all.

IV. Regarding the Burden of Compliance with the Commission's Order

We have not stressed, in our argument, the burdensome nature of the order's demands. In passing we refer to the large number of rates established by the Conference and the large number of merchants with whom it has regular contractual relations (R. 44). We also mention the inherent difficulties in reconstructing telephone conversations which have been conducted over a 6 month period and preparing an accurate memorandum of them. We mention these matters only in passing because in *Montship Lines* the court below, having held the order invalid for failure to state a purpose, commented that it was not necessary to pass upon the contentions there regarding the oppressive and burdensome nature of the demands. The very essence of the decision was that oppression and burden cannot be weighed except on the scale of relevancy to a legitimate purpose. Absent the purpose, the balance cannot be struck.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

New York, N.Y.
November 17, 1964

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,468

FAR EAST CONFERENCE, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,471

NORTH ATLANTIC BALTIC FREIGHT CONFERENCE, ET AL.,
PETITIONERS,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,475

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE,
ET AL., PETITIONERS,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,477

PACIFIC COAST EUROPEAN CONFERENCE, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,518

FAR EAST CONFERENCE, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

Consolidated Petitions for Review of Orders of the Federal Maritime Commission

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Decided August 20, 1964

Mr. Elkan Turk, Jr., with whom *Mr. Seymour H. Kligler* was on the brief, for petitioner in Nos. 18,468 and 18,518.

Mr. Burton H. White, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Arthur E. Tarantino* was on the brief, for petitioners in Nos. 18,471 and 18,475.

Mr. Charles F. Warren for petitioner in No. 18,477.

Mr. Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission, with whom Assistant

Attorney General *William H. Orrick, Jr., Messrs. James L. Pimper,* General Counsel, Federal Maritime Commission, and *Irwin A. Seibel,* Attorney, Department of Justice, were on the brief, for respondents.

Before WILBUR K. MILLER, FAHY and WRIGHT, *Circuit Judges.*

FAHY, *Circuit Judge*: Nos. 18,468, 18,471, 18,475 and 18,477 may be considered together. Each case is a petition by one or more steamship Conferences, composed of common carriers by water and organized under agreements approved by the Federal Maritime Commission under Section 15 of the Shipping Act of 1916, as amended, 75 Stat. 763, 46 U.S.C. § 814 (Supp. IV, 1961), to review orders of the Commission issued under the authority the Commission claims by reason of Section 21 of the Act.[1] The orders are not related to any proceeding pending before the Commission on a complaint, but have been issued as part of a

[1] Appeals from similar orders directed to other Conferences and involving different trade routes and commodities were previously filed in the Ninth Circuit. For that reason the Commission contends that this court is required to transfer these proceedings to the Ninth Circuit under 28 U.S.C. § 2112(a). That section provides that when proceedings are instituted in two or more courts of appeals with respect to the same agency order the agency shall file the record in that court in which such proceedings were first instituted and the other courts shall thereupon transfer the proceedings concerning such order to the court in which the record has been filed. We do not think that this section is here applicable; for although the requests for production in the orders involved in these cases and the orders appealed from in the Ninth Circuit are substantially identical, the orders themselves cannot be considered the "same order" within the meaning of the statute. Moreover, assuming that aside from the statute it is within the inherent power of the court to transfer the cases in the interest of sound judicial administration, we do not think that this case is an appropriate one for the exercise of such power since the appeals filed in the Ninth Circuit have already been disposed of by that court.

"Foreign Trade Study" by the Commission. Section 21 authorizes the Commission to

> require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath, whenever the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary,

followed by penalty provisions for non-compliance. 39 Stat. 736 (1916), 46 U.S.C. § 820 (1958).

Only Part I of the orders is involved.[2] It requires each Conference, as agent for its common carrier members, to produce at the Commission's offices in Washington, D. C., as follows:

> a. A copy of any letters, memoranda, circulars, and other correspondence or documents exchanged between the conference and any of its common carrier member lines and/or any of their agents, during the period January 1, 1962 through September 30, 1963, relating to rates on any of the commodities listed in Attachment A hereto. Documents which merely list or state such rates without discussion need not be furnished.
>
> b. A copy of any reports, studies, analyses or

[2] Other parts of the orders as originally issued have been suspended by Commission order of February 26, 1964.

documents compiled by or for or received by the conference between January 1, 1959 and September 30, 1963, with respect to all rates charged by the conference. Documents which merely list or state such rates without discussion need not be furnished.

Whenever any of the foregoing information has been otherwise furnished to the Commission, at the request of the Commission, a statement to that effect identifying the matter filed and the time of such filing, may be submitted in lieu of the matter requested.

This request was preceded by a recitation of the requirements of certain provisions of the Shipping Act[3] and a statement that production of the requested data was necessary "in order that the Commission may be properly informed as to matters bearing upon its responsibilities under these statutory provisions, and to determine what action if any it should take pursuant to such statutory provisions. . . ."

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[3] This part of the order reads as follows:

Under various provisions of the Shipping Act, 1916, and the Merchant Marine Act, 1936, the Commission is charged with certain regulatory responsibilities with respect to rates and practices of common carriers in the waterborne foreign commerce of the United States.

Section 15 of the Shipping Act, 1916, requires, among other things, that the Commission disapprove, cancel, or modify agreements found to be unjustly discriminatory or unfair as between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States or to be contrary to the public interest. Section 17 of the Shipping Act, 1916, prohibits common carriers by water in the foreign commerce of the United States from charging rates or fares which are unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign

Accompanying each order was a letter from the Chairman of the Commission stating that certain rates and charges applicable to cargo from certain ports of the United States to certain foreign ports exceeded those applicable to cargo from the foreign ports to ports of the United States, particularly with respect to the commodities listed in Attachment A to the orders; and that the Commission was considering institution of an investigation of the matter pursuant to Section 212(e) of the Merchant Marine Act, 1936, and/or rate proceedings to determine the issue of the detrimental character of the rates within the meaning of Section 18(a)(5) [sic--probably should read "18 (b)(5)"] of the Shipping Act, 1916, as amended. The letter continued,

> Prior to the institution of proceedings pursuant to the aforementioned statutory provisions, and if possible to obviate the necessity therefor, we request that you take immediate steps to make appropriate adjustments in your tariffs, particularly with respect to the rates on the commodities enumerated in Attachment A, or that you submit to the Commission statements setting forth all facts and conditions which explain or justify the higher export rates published by your conference. We

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competitors. Section 18(b)(5) of the Shipping Act, 1916, requires that the Commission disapprove rates found to be so unreasonably high or low as to be detrimental to the commerce of the United States.

Under Section 212(e) of the Merchant Marine Act, 1936, the Commission is required to investigate rates whereby shippers from the United States pay a higher rate from a United States port to a foreign port than the rate charged by the same carrier on similar cargo from such foreign port to such United States port, and to recommend to Congress measures by which such discimination may be corrected.

> request your compliance with the foregoing on or before December 15, 1963. For the purpose of evaluating your statement and determining whether formal proceedings should be instituted, the Commission is also requiring that you furnish the information described in the accompanying order issued pursuant to Section 21 of the Shipping Act, 1916.[4]

The question is whether the orders are valid. We note first the contention, pressed in No. 18,477, that the letter accompanying the order demonstrates that the Commission's purpose was to force a reduction in rates by requiring the Conferences to "reduce or produce", and that such a coercive tactic constitutes an invalid exercise of administrative authority. We can find no such coersive purpose in the combination of the order and the letter since, as we view the matter, the information requested was to be supplied whether or not the letter itself led to the rate adjustments suggested. We have the question whether the orders are valid, not the letters. We cannot hold the orders invalid if, considered apart from the letters, they are within the Commission's authority. *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, 145 (1937).

As to this we bear in mind the broad regulatory responsibilities of the Commission, considered with the exemption enjoyed by the Conferences from the

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[4] By orders of March 12, 1964, March 20, 1964, and April 22, 1964, this court denied the applications of petitioners for interlocutory injunctions restraining enforcement of the Commission's orders pending final determination of the petitions to review. The orders of March 12 also dissolved orders previously entered by this court staying the effectiveness of the Commission's orders in Nos. 18,468 and 18,471.

antitrust laws by reason of Commission approval of Conference agreements. See *Isbrandtsen Co.* v. *United States,* 93 U.S. App. D.C. 293, 297, 211 F.2d 51, 55, *cert. denied, Federal Maritime Board* v. *United States,* 347 U.S. 990 (1954). Within these broad responsibilities is lodged the specific authority here sought to be exercised. As to this we cannot accept petitioners' suggestion that Section 21 orders must be limited to complaint proceedings. They are available to aid investigation without the need for the support of a charge of violation of the Act, or belief even that such a violation is probable. *Isbrandtsen-Moller Co.* v. *United States, supra* at 144. In this respect the discussion by the Supreme Court in *United States* v. *Morton Salt Co.,* 338 U.S. 632, 652 (1950), is applicable, though that case involved the investigatory powers of the Federal Trade Commission and not of the Maritime Commission. And see *Pacific Westbound Conf.* v. *United States,* — F.2d — (9th Cir. 1964). *Cf. Montship Lines, Ltd.* v. *Federal Maritime Board,* 111 U.S. App. D.C. 160, 166, 295 F.2d 147, 153 (1961).

We need not discuss whether or not the data demanded, if the demand is otherwise valid, is of the type obtainable under Section 21, namely, "any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act"; for petitioners accept the view of the Commission in this respect. At least they do not dispute it in these cases, no doubt in part because of the views expressed by this court in *Montship, supra,* as to the broad construction to be

given the enumeration in Section 21 of the kind of data the Commission may require.[5]

There is a contention, however, that a Conference is not an entity to which a Section 21 order may be applied. That section is applicable to "any common carrier by water" or "other person subject to this Act," or "any officer, receiver, trustee, lessee, agent or employee" thereof. The fact is that the Conferences are in many respects agents of the carriers which compose them. If the Conferences are in possession of the data, and the data is otherwise validly sought, it may not be refused on the theory the Conferences are not answerable to a Section 21 order.

Petitioners also contend that the orders are invalid because the data sought is not reasonably related to the Commission's statutory authority over rates in foreign commerce. They claim that the Commission's only source of control over such rates is Section 18(b)(5) which requires Commission disapproval of rates found "to be so unreasonably high or low as to be detrimental to the commerce of the United States," and under this limited statutory authority the Commission is concerned only with the effect of rates, not with the rate-making processes to which the requested data relates. As we read the statute, however, the Commission's concern is not solely with the detrimental effect of rates on the commerce of the United States but also with the reasonableness of rates, to which the information sought is related. We have in mind also the command of Section 212(e) which di-

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[5] Petitioners, however, do contend that an order "to produce" is not authorized by Section 21 since that section literally requires a carrier only "to file" the requested data. Whatever the difference between producing and filing, we think this contention was disposed of by this court's opinion in *Montship, supra*.

rects the Commission to investigate disparities between import and export rates and to recommend to Congress measures by which such discrimination may be corrected.

A principal argument of petitioners is based on the decisions of this court in the *Montship* case, and in *Hellenic Lines, Ltd.* v. *Federal Maritime Board,* 111 U.S. App.D.C. 151, 295 F.2d 138 (1961), which held the Section 21 orders then before the court to be invalid because they were set forth in such general terms that no standard existed by which to determine the relevancy of the information demanded, a defect which bore upon the reasonableness of the orders. Here, however, the purposes are set forth with reference to particular sections of the statute and the need of the Commission for the information in order "that the Commission may be properly informed as to the matters bearing upon" the responsibilities imposed upon it by the sections thus referred to. This is clearly an effort by the Commission to meet the defect pointed out in our *Montship* and *Hellenic Lines* decisions, and, like the Ninth Circuit in its recent decision in *Pacific Westbound,* we think the effort has succeeded and that the stated purposes of the order show the relevancy of the data sought. The requirements to be met in the investigatory area of administrative agencies, stated in general terms in the *Morton Salt* case, seem to us to be satisfied in this case:

> [I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 338 U.S. 632, 652.

A word now as to the possible oppressiveness of the demand to produce, that is, the difficulty of compliance

in relation to the need of the Commission to obtain the information. We have no basis in the record for finding oppressiveness. We rely upon the prudence and reasonableness of the Commission in cooperating with the Conferences in the manner of complying. *Cf. United States* v. *Morton Salt Co., supra* at 653.

No. 18,518. Aside from matters above disposed of, in this case Far East Conference challenges a Section 21 order demanding the data which is described in the copy of the order which is set forth as an Appendix to this opinion. As appears therefrom the data demanded relates to requests and complaints of shippers. Section 15 of the Shipping Act of 1916 was amended in 1961, 75 Stat. 764, 46 U.S.C. § 814 (Supp. IV, 1961), by adding a provision as follows:

> The Commission shall disapprove any such [Section 15] agreement, after notice and hearing, on a finding of . . . failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

The order recites that the Commission needs the data sought so as to be adequately informed as to matters bearing upon its responsibilities under this statutory provision. The objection of petitioner is that the statute vests authority in the Commission with respect to reasonable procedures for hearing and considering shippers' requests and complaints, whereas the order seeks data not as to procedures but as to requests and complaints made, and action taken in connection therewith. But it seems quite clear to us that the Commission in ascertaining whether or not the Conference has adopted and is maintaining reasonable procedures respecting requests and complaints of

shippers is entitled to find out what requests and complaints have been made and what disposition has been made of them. The information requested is designed to inform the Commission as to this.

In all the cases we have not neglected to consider Section 6(b) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. § 1005(b) (1958), limiting an agency in demanding reports and making investigations except as the agency may be authorized by law. Being of opinion that the orders are authorized by law, it follows we find Section 6(b) no bar to them.

Affirmed.

Circuit Judge WILBUR K. MILLER dissents.

APPENDIX

Section 21 Order

STUDY—CONFERENCE PROCEDURES FOR HEARING AND CONSIDERING SHIPPERS' REQUESTS AND COMPLAINTS

Section 15 of the Shipping Act, 1916, requires, among other things that the Commission disapprove any agreement between parties subject to that Act on a finding of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

In order that the Commission may be adequately informed as to matters bearing upon its responsibilities under this statutory provision, and to determine what action, if any, it should take under this provision, it is necessary that the conference named herein furnish the Commission with the information hereinafter specified.

Now THEREFORE, pursuant to the authority vested in it under Section 21 of the Shipping Act, 1916, the Commission hereby orders THE FAR EAST CONFERENCE (Agreement No. 17), as agent for each of the member lines thereof, to produce at the Commission's offices in Washington, D. C., not later than January 22, 1964 the following:

1. A copy, or if oral, a complete statement of each request and/or complaint filed during the period July 1, 1963 to December 31, 1963, inclusive.

2. Copies of all interim correspondence and memoranda including all inter-office memoranda and correspondence between the conference and carriers and any report or studies pertaining to each individual request and/or complaint mentioned in Paragraph 1 above.

3. A copy, or if oral, a complete statement of each notice to shippers advising of actions taken in connection with such requests and complaints.

4. A brief resume to accompany the above setting forth the date received, the name and address of the party, the nature of the request or complaint, the date of disposition, the method of disposition, and if denied, the reason for such denial.

Whenever any of the foregoing information has been otherwise furnished to the Commission, at the request of the Commission, a statement to that effect, identifying the matter filed and the time of such filing, may be submitted in lieu of the matter requested.

By Commission December 27, 1963

Francis C. Hurney
for Thomas Lisi
Secretary

APPENDIX B

Constitutional and Statutory Provisions Involved

I. Amendment IV to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

II. Sec. 15, Shipping Act, 1916, 39 Stat. 733, as amended by 75 Stat. 763 (46 U. S. C. §814):

That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner

providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable

procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

III. Sec. 21, Shipping Act, 1916, 39 Stat. 736 (46 U. S. C. §820):

That the board may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

IV. Sec. 2 of the Judicial Review Act (Federal Agencies), 64 Stat. 1129, as amended (5 U. S. C. §1032):

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402(a) of the Communications Act of 1934, as amended, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 309(e) and 317 of the Packers and Stockyards Act and section 7(a) of the Perishable Agricultural Commodities Act, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercostal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended, and (d) of the Atomic Energy Commission made reviewable by section 189 of the Atomic Energy Act of 1954, as amended.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof.

V. Sec. 4 of the Judicial Review Act (Federal Agencies), 64 Stat. 1130 (5 U. S. C. §1034):

Any party aggrieved by a final order reviewable under this Act may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof lies, a petition to review such order. Upon the entry of such an order,

notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General.

VI. Sec. 10 of the Judicial Review Act (Federal Agencies), 64 Stat. 1132, (5 U.S.C. §1040):

An order granting or denying an interlocutory injunction under section 1039(b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254(1) of Title 28: Provided, That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254(1) of Title 28: Provided further, That application therefor be duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254(3) of

Title 28, regarding certification, and of section 2101(e) of Title 28, regarding stays, shall also apply to proceedings under this chapter.

VII. Sec. 6(b) of the Administrative Procedure Act, 60 Stat. 240 (5 U. S. C. §1005):

(b) INVESTIGATIONS—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

* * *

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 699

FAR EAST CONFERENCE, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA

No. 700

PACIFIC COAST EUROPEAN CONFERENCE, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA

No. 703

FAR EAST CONFERENCE, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 337 F. 2d 146 and reproduced as Appendix A to each petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1964. Petitions for writs of certiorari were filed in Nos. 699 and 700 on November 17, 1964, and in No. 703 on November 18, 1964. The jurisdiction of this Court is invoked in all three cases under 28 U.S.C. 1254(1) and 5 U.S.C. 1040.

QUESTIONS PRESENTED

1. Whether Section 21 of the Shipping Act, 1916, authorizes the Federal Maritime Commission to secure information prior to the institution of a formal proceeding.

2. Whether the Commission's orders provide an adequate statement of purpose to determine the relevancy of the information sought.

3. Whether the information sought is relevant to areas of responsibility conferred upon the Commission.

STATUTES INVOLVED

The relevant provisions of Sections 15, 17, 18(b)(5) and 21 of the Shipping Act, 1916, as amended (46 U.S.C. 814, 816, 817(b)(5) and 820) and Section 212(e) of the Merchant Marine Act, 1936 (46 U.S.C. 1122(f) are included in Appendix B to the petitions.

STATEMENT

Petitioners, seven shipping conferences whose members are engaged in foreign water-borne commerce as common carriers, challenge orders issued to them as agents of their member lines which require them to furnish to the Commission certain specified data in

their possession. The orders were served under Section 21 of the Shipping Act, 1916, 46 U.S.C. 820, which authorizes the Commission to require any common carrier by water, or any officer, agent or employee thereof, to file with it "any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier * * *."

(a) *Nos. 699 and 700*

In these two cases the seven petitioners attack a Section 21 order served, in substantially identical form, on each petitioner as well as on other conferences, relating to rates charged by the conferences (J.A. 24–29, 75–99, 135–148, 187–192).[1] The order required the conferences to submit certain specified information dealing with rates generally as well as additional information as to a limited number of commodities (Pet. App. No. 700, pp. 4–5). It recited that under various provisions of the Shipping Act of 1916 and the Merchant Marine Act of 1936, "the Commission is charged with certain regulatory responsibilities with respect to rates and practices of common carriers in the waterborne foreign commerce of the United States," and summarized these responsibilities as set forth in Sections 15, 17, and 18(b)(5) of the Shipping Act and Section 212(e) of the Merchant

[1] These references are to the amended order served December 27, 1963, as set forth in the Joint Appendix in Nos. 18,468, 18,471, 18,475, and 18,477 in the court below, which has been filed in this Court.

Marine Act of 1936.[2] The order then stated that the requested information was necessary "in order that the Commission may be properly informed as to matters bearing upon its responsibilities under these statutory provisions, and to determine what action if any it should take pursuant to such statutory provisions * * *" (*id.* p. 6).

(b) *No. 703*

In this case the Far East Conference attacks an order requiring it to file with the Commission certain information relating to its handling of shippers' re-

[2] The order set forth the Commission's responsibilities under these provisions as follows (Pet. App. No. 700, pp. 5–6):

> Section 15 of the Shipping Act, 1916, requires, among other things, that the Commission disapprove, cancel, or modify agreements found to be unjustly discriminatory or unfair as between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States or to be contrary to the public interest. Section 17 of the Shipping Act, 1916, prohibits common carriers by water in the foreign commerce of the United States from charging rates or fares which are unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Section 18(b)(5) of the Shipping Act, 1916, requires that the Commission disapprove rates found to be so unreasonably high or low as to be detrimental to the commerce of the United States.
>
> Under Section 212(c) of the Merchant Marine Act, 1936, the Commission is required to investigate rates whereby shippers from the United States pay a higher rate from a United States port to a foreign port than the rate charged by the same carrier on similar cargo from such foreign port to such United States port, and to recommend to Congress measures by which such discrimination may be corrected.

quests and complaints. On December 27, 1963, the petitioner as well as 22 other shipping conferences were served with an order under Section 21 requiring them to furnish copies of, or memoranda regarding, requests and complaints by shippers received during the 5½-month period July 1 through December 15, 1963, together with copies of notices from the conferences to the shippers as to the action taken on the requests or complaints.[3] The Commission's order (Pet. App. No. 703, pp. 12a–13a) cited Section 15 of the Shipping Act and referred specifically to its requirement that the Commission disapprove an agreement upon finding a failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints. The order stated that the requested information was necessary "in order that the Commission may be adequately informed as to matters bearing upon its responsibilities under this statutory provision, and to determine what action, if any, it should take under this provision * * *" (*id.*, p. 12a).

(c) *Proceedings below*

Petitions to reconsider and vacate the orders (JA 16–24, 99–111, 149–160, 219–235 and JA 5–14) were denied by the Commission on the ground, *inter alia*, that it could not adequately perform its statutory duties without the information sought by the orders (JA 33–39, 111–117, 160–166, 210–216, and JA 15–20). Applications for injunctions *pendente lite* were

[3] More than 30 conferences voluntarily filed such information upon request by the Commission without a Section 21 order.

thereafter filed with the court of appeals and, after hearing, were denied (JA 243–254 and JA 46–48).[4]

The cases represented herein by Nos. 699, 700 and 703 were all heard together below and the court, per Judge Fahy, rendered one opinion, upholding the validity of all the orders (Judge Miller dissenting without opinion). After referring to the broad regulatory responsibilities of the Commission and the antitrust exemption enjoyed by the conferences by reason of Commission approval of conference agreements, the court rejected petitioners' contention that Section 21 orders must be limited to formal proceedings and stated that under *Isbrandsten-Moller Co.* v. *United States*, 300 U.S. 139, 144, and *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652, Section 21 orders may be used to "aid investigation without the need for the support of a charge of violation of the Act, or belief even that such a violation is probable" (Pet. App. No. 700, pp. 7–8). The court also held that the orders contained a sufficient statement of purpose to permit a determination of relevancy and reasonableness of the information sought, noting that, unlike the orders in *Montship Lines Ltd.* v. *Federal Maritime Board*, 295 F. 2d 147 (C.A.D.C.) and *Hellenic Lines, Ltd.* v. *Federal Maritime Board*, 295 F. 2d 138 (C.A.D.C.), the Commission here set forth its purposes and the need for the information with reference to particular sections of the statute (Pet. App. No. 700, pp. 9–10).

[4] Petitioners have not yet complied with the orders.

In dealing with specific objections to the orders involved in Nos. 699 and 700 (those seeking information relating to rates), the court rejected the contention that the data sought was not reasonably related to the Commission's statutory authority. It held that under Section 18(b)(5), which requires Commission disapproval of rates found "to be so unreasonably high or low as to be detrimental to the commerce of the United States", the Commission's concern, contrary to petitioners' claim, is not solely with the detrimental effect of rates on the commerce of the United States but also with the reasonableness of rates, and the information sought was related to that concern. Moreover, the court pointed out, the information sought was relevant to the Commission's powers under Section 212(e) of the Shipping Act, which directs the Commission to investigate disparities between import and export rates and make recommendations to Congress by which such discrimination may be corrected (*id.*, p. 9). In respect to the order under attack in No. 703, the court held that "the Commission in ascertaining whether or not the Conference has adopted and is maintaining reasonable procedures respecting requests and complaints of shippers is entitled to find out what requests and complaints have been made and what disposition has been made of them" (*id.*, p. 11). The court therefore affirmed the Commission's orders.

ARGUMENT

This case involves only the authority of the Maritime Commission to obtain information necessary for the performance of its statutory functions relating to

rates and to procedures for handling shipper requests and compiaints. The decision below parallels the recent holding of the Court of Appeals for the Ninth Circuit in *Pacific Westbound Conference* v. *United States,* 332 F. 2d 49, which sustained an order identical in all material respects to those herein involved in Nos. 699 and 700. Another panel of the court below (Bazelon, Burger and Wright) this month unanimously upheld, *per curiam,* orders identical to that involved in No. 703. (*Pacific Westbound Conf.* v. *Federal Maritime Commission,* decided December 2, 1964, Nos. 18,592–18,594, 18,641 (Appendix, *infra*)). These decisions followed this Court's holding under the Shipping Act in *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, and are in accord with principles enunciated by the Court in the context of other regulatory statutes, *United States* v. *Morton Salt Co.,* 338 U.S. 632; *Oklahoma Press Pub. Co.* v. *Walling,* 327 U.S. 186. They are also in accord with prior decisions of other lower courts under the Shipping Act, *Kerr Steamship Co.* v. *United States,* 284 F. 2d 61 (C.A. 2);[5] *Montship Lines, Ltd.* v. *Federal Maritime Board,* 295 F. 2d 147 (C.A.D.C.). The decision below is plainly correct. There is no conflict. No further review is warranted.

1. Petitioners' attack (Pet. No. 700, pp. 13–16; Pet. No. 703, pp. 14–15) on the Commission's attempt to obtain information relating to the conference's activi-

[5] In *Kerr Steamship,* certiorari was granted and the case remanded with directions to dismiss as moot, 369 U.S. 422, after the Commission vacated the order in question.

ties, without first instituting a formal proceeding to determine whether violations of the Act have occurred, is clearly without merit. This Court rejected the very same argument in *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, 144–145, which held that the Commission could use the authority conferred by Section 21 to obtain information necessary to the exercise of its functions under other sections of the Act and rejected the contention that investigations by the Commission must be conducted only by means of its subpoena power under Section 27 after a hearing has been commenced. See also the cases cited in the preceding paragraph.[6]

2. Similarly, petitioners' contention that the orders in question are not relevant to any subject of legitimate inquiry by the Commission is without merit.

a. The orders in Nos. 699 and 700 requested copies of certain documents relating to petitioners' rates generally and on a limited number of commodities for a 21-month period. The request was made, as the orders said, in pursuance of the Commission's

[6] The petitioner in No. 700 attempts to rely on the failure of Congress to adopt a particular proposal of the Federal Maritime Board dealing with preliminary investigations (Pet. No. 700, pp. 14–15). However, the failure of Congress to act on this proposal may be explained by the clarification of Section 21 in the *Montship* case, *supra*, which was decided after this proposal was submitted to Congress and which made it, in part, unnecessary. H. Rep. 498, 87th Cong., 1st Sess. 23, 25; S. Rep. 860, 87th Cong., 1st Sess. 24–25. Moreover, this proposal was much broader in scope than the Commission's orders now under attack and would have provided for the swearing of witnesses and the taking of testimony antecedent to the filing of any formal proceeding (Pet. No. 700, p. 15).

responsibilities with respect to unjustly discriminatory or unfair rates under Sections 15 and 17 of the Shipping Act and rates which are so unreasonably high or low as to be detrimental to the commerce of the United States, under Section 18(b)(5) of that Act. In the light of these provisions, the court of appeals was clearly correct in holding that the Commission is properly concerned with the reasonableness of rates in foreign commerce and that the information sought was relevant to that purpose. Moreover, the court also referred, as did the orders, to "the command of Section 212(e) [of the Merchant Marine Act, 1936], which directs the Commission to investigate disparities between import and export rates and to recommend to Congress measures by which such discrimination may be corrected" (Pet. App. No. 700, p. 9).

Nevertheless, petitioners attempt to show that this demand exceeded the Commission's legitimate interest in rates. In the main they claim the Commission has embarked on an unauthorized program of general "control" over the level of international freight rates (No. 699, pp. 8–12; No. 700, pp. 7–9). However, the Commission is not attempting to exercise control over any rates by these orders; it is simply asking for information so that it may determine what, if any, action within its statutory jurisdiction is appropriate.[7]

[7] Petitioners' assertion that "the production order under review was not really a study at all but a penalty, invoked as an alternative form of compliance" if petitioners failed to make certain adjustments in rates requested in a letter which accompanied the orders is erroneous. (No. 700, p. 9.) The letters had no such coercive effect. As the court of appeals found

b. The order under attack in No. 703 seeks production of copies of shippers' requests and complaints received by the conference, as well as documents reflecting the conference's handling and disposition of such requests and complaints. The demand was made, as the order said, in pursuance of the Commission's responsibility under Section 15 of the Act to disapprove any Section 15 agreement for failure or refusal of the parties thereto to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Under this provision of the Shipping Act, the Commission's concern is not limited to "procedures" in the abstract, as petitioner contends (Pet. No. 703, pp. 13–15). The manner in which petitioner actually handles requests and complaints has a vital bearing on the reasonableness of the procedure which the statute requires it to maintain. See H. Rep. 498, 87th Cong., 1st Sess., 3, 11; S. Rep. 860, 87th Cong., 1st Sess., 18. The information requested is designed to inform the Commission as to whether the Conference's procedures were reasonable in actual operation.

3. The petitioners, relying on the *Hellenic* and *Montship* cases, *supra,* also contend that the orders lacked an adequate statement of purpose and therefore violate the Fourth Amendment (Pet. No. 699, pp. 14–16; Pet. No. 703, pp. 12–17). However, unlike the orders held defective in those cases, the present orders

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"the information requested was to be supplied whether or not the letter itself led to the rate adjustments suggested." (Pet. App. No. 700, p. 7).

specifically stated that the Commission was seeking information so it might properly be informed as to matters bearing upon the responsibilities imposed upon it by Sections 15, 17 and 18(b)(5) of the Shipping Act and by Section 212(e) of the Merchant Marine Act, and further explained what these responsibilities were.[8] We submit that the court of appeals was correct when it found this statement of purpose adequate to show the relevancy of the data sought. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652.[9]

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[8] Thus, there is no conflict between the decision in this case and those in *Hellenic* and *Montship* as petitioners contend (Pet. No. 700, pp. 14–16; Pet. No. 703, pp. 12–13. Moreover, Judge Bazelon who wrote the opinion in those cases joined in a recent *per curiam* order upholding orders identical to those in No. 703. *Pacific Westbound Conference* v. *Federal Maritime Commission*, decided December 2, 1964, Nos. 18592–18594, 18,641 (Appendix, *infra*).

[9] Petitioner in No. 700 raises the additional question whether this Court's opinion in *United States* v. *Morton Salt Co.*, *supra*, should "be read as a cover of authority for any administrative demand, no matter how broad, how burdensome, or how irrelevant" (Pet. No. 700, pp. 2-3). We agree that *Morton Salt* should not be read in this manner but the question is not presented by this case. The orders, as pointed out above, were relevant to a lawful purpose, and as the court below found, there was no basis in the record for a finding of oppressiveness (Pet. App. No. 700, p. 10).

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

Respectfully submitted.

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DECEMBER 1964.

APPENDIX

United States Court of Appeals for the District of Columbia Circuit

September Term, 1964

No. 18592

PACIFIC WESTBOUND CONFERENCE, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 18593

PACIFIC COAST EUROPEAN CONFERENCE, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 18594

PACIFIC COAST RIVER PLATE BRAZIL CONFERENCE, AND ITS MEMBER LINES, PETITIONERS

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 18641

PACIFIC/STRAITS CONFERENCE, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

On Petitions for Review of Orders of the Federal Maritime Commission

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Before BAZELON, Chief Judge, and BURGER and WRIGHT, Circuit Judges:

JUDGMENT

These cases came on to be heard on the record from the Federal Maritime Commission, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the Federal Maritime Commission on review herein are affirmed.

Per Curiam.

Dated: Dec. 2, 1964.

Filed Dec. 2, 1964, United States Court of Appeals for the District of Columbia Circuit:

(Sgd.) NATHAN J. PAULSON, *Clerk.*

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